A HANDBOOK ON LEGAL COUNSELLING AND INTERVIEWING

By

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PREFACE

When I was invited to teach by Justice Artemio G. Tuquero, then Dean of the College of Law of the University of the East, I was assigned Special Proceedings and Legal Counselling. The latter subject seemed new to me for I remember we never had such a subject during my student days at UST. I learned later on that this subject was incorporated in the law curriculum only in the mid eighties. I looked for materials and books on the subject, but to my dismay, I found none. I asked myself what am I going to teach in this subject and in the beginning, I contended myself with some foreign materials and outlines and from then on, I began to make researches on the subject. Whenever I travelled abroad, my first, favorite destination was always a bookstore and luckily enough, I was able to get some books and materials from the United States and Hongkong. In the meantime, some of my students asked me if I could come out with a book on the subject so they would not tire out writing during lecture hours. Such request would be repeated semester after semester. Soon, I developed my own ideas and concept on the subject, mixed with my actual experiences as a litigation lawyer for the past fifteen years. I continuously compiled my notes for the past three years and I had to give up some of my time for free Legal Aid work in order to bring to reality my wish of coming out with a book on Legal Counselling and Interviewing.

It is hoped that this book will be a simple yet modest contribution to the law profession.

Manila, November 26, 1996.

MAURICIO C. ULEP

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INTRODUCTION

Have you ever wondered why there are so many cases filed in court? Why there is a backlog of so many cases from our Metropolitan Trial Courts up to the Supreme Court? We have many rules of procedure and yet they become mazes of confusion when they are applied. Sometimes, they become sources of desperation to the one in quest for speedy justice and to the downtrodden. Blame it to our being "overly contentious" and "litigation prone" people.

But this could be avoided.

It is about time the lawyer must realize that cases are won in the law office and not in the courtroom; that the temples of justice and the caldrons of the courts and existing rules of procedure must only be resorted to if it is inevitable to litigate, where there are difficult questions of law involved or where other remedies have become deficient or exhausted.

This will only happen if the lawyer will have good interviewing and counselling skills; if he will only have a technique at winnowing fact from fiction and a working knowledge of the fundamental and applicable law; if he can handle the levers of misconceived errors and unguided legal perceptions towards correcting the same for the mutual benefit of litigants and in convincing them to settle their controversies out of court.

Do not mind if you will spend countless hours in the interview with your client; or if you will discuss his problem diurnally. The point is, if you can convert those countless

hours of conversation and interview into a henotic situation, then you have done your duty as a lawyer and your duty to the courts.

This book aims to aid and re-engineer the task of the lawyer in developing interviewing and counselling skills which is indispensable in his legal work especially because interviewing and counselling occupies his time, first and foremost whenever a client seeks his help.

DEFINITION OF TERMS

1. Legal Interviewing Defined — It is the task of gathering information. It involves gathering of relevant data specifically of the following:
    1. nature of the client's problem,
    2. the client's legal position, and
    3. the probable consequences of adopting litigation or some other course of action to resolve the matter. (p. 5, Binder and Price, Legal Interviewing and Counselling: A Client Centered Approach, 1977 Ed.)

The adequacy of the information gathered by the lawyer will depend on the following:

1. The lawyer's general approach;
2. The client's initial impression of the lawyer and of the place where they work together;
3. The initial feelings the two people have for one another;
4. The manner in which the lawyer goes after information;
5. The lawyer's perception of the facts as the client begins to provide them;
6. The client's expectations and images concerning the law;
7. The attorney's understanding of his client's concerns as these are placed in their broader context;

8. Theories and models used by the lawyer to explain the client's behavior.

2. Legal Counselling Defined — It is the task of formulating solutions. It is a process in which potential solutions with their probable positive and negative consequences are identified and then weighed in order to decide which alternative is most appropriate. (p. 5, Binder and Price, Legal Counselling and Interviewing, A Client Centered Approach, 1977 Ed.)
3. Counsel Defined — It means "an adviser, a person professionally engaged in the trial of management of a case in court; a legal advocate managing a case at law; a lawyer appointed or engaged to advise and represent in legal matters a particular client, public officer or public body." (Villegas vs. Legaspi, 113 SCRA 39)
4. Effective and Vigilant Counsel Defined — It means that it necessarily and logically requires that the lawyer be present and able to advise and assist his client from the time the confessant answers the first question asked by the investigating officer until the signing of the extrajudicial confession. Moreover, the lawyer should ascertain that the confession is made voluntarily and that the person under investigation fully understands the nature and consequence of his extrajudicial confession in relation to his constitutional rights. (People vs. Bacamante, 248 SCRA 47)
5. Attorney At Law Defined — That class of persons who are by license, officers of the courts, empowered to appear, prosecute and defend, and upon whom perculiar duties, responsibilities and liabilities are developed by law as a consequence. (Cui vs. Cui, 11 SCRA 759)
6. *Titulo de Abogado* Defined — It means not mere possession of the academic degree of Bachelor of Laws but membership in the Bar after due admission thereto, qualifying one for the practise of law. (Cui vs. Cui, 11 SCRA 759)
7. Practise of Law Defined — It means any activity, in or out of court, which requires the application of law, legal proce-

dures, knowledge, training, and experience. To engage in the practise of law is to perform those acts which are characteristics of the profession. Generally, to practise law is to give service or render any kind of service that involves legal knowledge or skill. The practise of law is not limited to the conduct of cases in court. It includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be pending in a court. In its broader meaning, a person is also considered to be in the practise of law when xxx for valuable consideration, engages in the business of advising persons, firms, associations or corporations as to their rights under the law, or appears in a representative capacity as an advocate in proceedings, pending or prospective, before any court, commissioner, referee, board, body, committee, or commission constituted by law or authorized to settle controversies and there, in such representative capacity, performs any act or acts for the purpose of obtaining or defending the rights of their clients under the law. Otherwise stated, one who, in a representative capacity, engages in the business of advising clients as to their rights under the law, or while so engaged performs any act or acts either in court or outside of court for that purpose, is engaged in the practise of law. (State ex rel. Mckittrick v. C.S. Dudley and Co., 102 S.W. 2d 895, 340 Mo. 852). Moreover, "the practise of law is not limited to the conduct of cases or litigation in court; it embraces the preparation of pleadings, the management of such actions and proceedings on behalf of clients before judges and courts, and in addition, conveying. In general, all advice to clients, and all action taken for them in matters connected with the law incorporation services, assessment and condemnation services contemplating an appearance before a judicial body, the foreclosure of mortgage, enforcement of a creditor's claim in bankruptcy and insolvency proceedings and conducting proceedings in attachment, and in matters of estate and guardianship have been held to constitute law practise, as do the preparation and drafting of legal instruments, where the work done involves the determination by the trained legal mind of the

legal effect of facts and conditions (5 Am. Jur. 262, 263). Practise of law under modern conditions consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces conveyancing, the giving of legal advice on a large variety of subjects and the preparation and execution of legal instruments covering an extensive field of business and trust relations and other affairs. Although these transactions may have no direct connection with court proceedings, they are always subject to become involved in litigation. They require in many aspects a high degree of legal skill, a wide experience with men and affairs, and great capacity for adaptation to difficult and complex situations. These customary functions of an attorney or counselor at law bear an intimate relation to the administration of justice by the courts. No valid distinction, so far as concerns the question set forth in the order, can be drawn between that part of the work of the lawyer which involves appearance in court and that part which involves advice and drafting of instruments in his office. It is of importance to the welfare of the public that these manifold customary functions be performed by persons possessed of adequate learning and skill, of sound moral character, and acting at all times under the heavy trust obligations to clients which rests upon all attorneys (Moran, Comments on the Rules of Court, Vol. 3 [1973 ed.], pp.665-666, citing In Re: Opinion of the Justices [Mass.], 194 N.E. 313, quoted in Rhode Is. Bar Assoc. v. Automobile Service Assoc. [R.I.] 179 A. 139, 144. (Ulep vs. Legal Clinic, Inc., 223 SCRA 378)

8. Preventive Lawyering Defined — It is concerned with minimizing the risks of legal trouble and maximizing legal rights for such legal entities at that time when transactional or similar facts are being considered or made. (Cayetano vs. Monsod, 201 SCRA 210)

9. *Amicus Curiae* Defined. — He is a bystander, usually a lawyer, who interposes and volunteers information upon some matter of law in regard to which the judge is doubtful or mistaken. A lawyer who appears in court as *amicus curiae* cannot claim compensation because he does not

appear as counsel for any party. Moreover, the assistance he renders is part of his duties as an officer of the court. (Answer to 1979 Bar Examination Question in Legal Ethics and Practical Exercises)

Chapter II

PRE-INTERVIEW CONSIDERATIONS

A. PREPARATION

A.1. Preparing yourself

Before starting the interview, you must be able to identify your objectives specifically the following:

a. Establishing a good rapport/relationship with the client. Rapport building requires using polite and pleasant greetings in a professional manner.

b. Gathering sufficient information to enable you to make a preliminary diagnosis or explanation, if able;

c. Giving the client an outline of the legal position;

d. Finding out the client's expectations and intentions;

e. Explaining your law firm's fee structure and discussing payment of professional fees. (p. 39, Effective Interviewing, Helena Twist, 1992 Ed.)

A.2. Preparing your Client

Before you meet your client in the interview, it will be good to ask them to bring relevant documents, charts, photographs, sketch, maps, visual aids, medical certificate, video tapes, X-Ray results, ballistic tests and results of blood tests, if applicable, or any illustrative evidence. You might also want to request

from him to bring his community tax certificate which is indispensable in the preparation of pleadings. If he has none, especially adolescents and senior citizens, require him to bring any identification card or passport, if any. This is so because "the relevancy aspects of demonstrative and real evidence are no different from other evidence: if its appearance or other physical characteristics render a fact of consequence more or less probable, the demonstrative or real evidence is relevant. The requirement is met by demonstrative evidence which promotes understanding of other relevant evidence. The verbal testimony, which the demonstrative evidence aids in understanding, must of course itself be relevant to a fact of consequence in the litigation." (Graham on evidence, 1986). Moreover, "tangible objects involved in an incident of almost every kind have been admitted into evidence in recognition of the explanative value of the sense impression derived from the object. The fact of consequence to which the object relates need not be in dispute. Relevant real evidence may be excluded, however, on the grounds of unfair prejudice or needless presentation of cumulative evidence. Nevertheless, in view of the present general acceptance of evidence of this nature, the exclusion of an object of undoubted relevance and probative value on either ground is unlikely. Moreover, as a matter of overall policy, if the fact of consequence for which offered is important in the litigation and of the probative value of the tangible evidence is high, exclusion of the evidence should occur only in the most unusual circumstances. If "seeing is believing," the court should be permitted to see." (Graham on Evidence, 1986 ed., cited in p. 71, Paras, Rules of Court Annotated, Vol. 4, 1991 Ed.) In some cases where clients decide to change their lawyers, ask them to bring the folder of the case, so you can study the proceedings had thereon. This will show that you are taking the meeting seriously and you are involving the client in the process in expediting the interview.

B. TIMING

Of course, you must consider that each client has his own time and schedule to contend with. Unless in emergency cases, you must remember that the best time to conduct a legal interview is the best time of your client.

C. THE ENVIRONMENT

C.1. The need for a reception area

Consulting a lawyer is just like going to a medical clinic where a reception area is needed while the client waits for his turn for the interview. Thus, there has to be a reception area where the client could relax while waiting. It is therefore recommended that the reception area of the law office must be a tidy, and a cozy one. It must have a little decoration, say simple paintings, a provision of coffee or tea or soft drinks, magazines and newspapers and anything which will tend to make the client feel at home.

C.2. The interview room

An ideal place in conducting a legal interview is a separate interview room where the client and the lawyer could openly talk about confidential matters and legal problems. In its absence, the law office proper would do, provided it is neat and conducive for the interview.

D. SEATING ARRANGEMENTS

The seating arrangement of a lawyer vis-a-vis the client must not be taken for granted. There are different sizes of office tables (rectangular or even round) and yet you must consider that the seating arrangement has a big role to play during the interview. Many lawyers will normally employ the traditional seating arrangement where he is seated behind a desk with the client seated opposite him. Unless you are in an attorney's visit in the National Penitentiary or in any Metro Manila Jail where there are no tables or chairs (only benches), ONE EFFECTIVE WAY is to sit at one side of the desk at a 45 degree angle to your

client. Several advantages of this seating arrangement are: (1) it indicates cooperation (2) neutrality (3) easy eye contact and (4) better interaction.

E. NOTE-TAKING

During the legal interview, the lawyer must take down notes. The purpose of note-taking is to record facts and to recall and help you plan action after the interview is over.

How do you take notes?

(1) Use symbols and abbreviations.

(2) Use wide margins.

(3) Use indentions for subsidiary points.

(4) Simply take down the key points.

(5) Avoid taking very full notes.

(6) If the client says something unusual, note down the client's own words.

(7) Develop a shorthand if you can.

(8) Slow the pace by posing dummy questions like, "Wait a minute, Mr. Cruz. What you say is important. I want to get down every word."

F. USING A TAPE RECORDER

During the legal interview, you can use a tape recorder provided you get the prior consent of your client. If not, secret taping of a conversation is punishable under the Anti-Wiretapping Law. This is in accordance with the latest case of Ramirez vs. Court of Appeals, 248 SCRA 590 where the Supreme Court held as follows:

> "Section 1 of R.A. 4200 entitled "An Act to Prohibit and Penalize Wire Tapping and Other Related Violations of Private Communication and Other Purposes," provides:
>
> Section 1. It shall be unlawful for any person not being authorized by all the parties to any private communication or spoken word, to tap any wire or cable, or by using any other device or arrangement, to secretly overhear, intercept, or record such communication or spoken word by using a device commonly known as a dictaphone or dictagraph or detectaphone or walkie-talkie or tape recorder, or however otherwise described.
>
> The aforestated provision clearly and unequivocally makes it illegal for any person, not authorized by all the parties to any private communication to secretly record such communication by means of a tape recorder. The law makes no distinction as to whether the party sought to be penalized by the statute ought to be a party other than or different from those involved in the private communication. The statute's intent to penalize all persons unauthorized to make such recording is underscored by the use of the qualifier "any." Consequently, as respondent Court of Appeals correctly concluded, "even a (person) privy to a communication who records his private conversation with another without the knowledge of the latter (will) qualify as a violator" under this provision of R.A. 4200.

As a matter of fact, even the unauthorized tape recordings of a telephone conversation is not admissible in evidence. (Salcedo-Ortanez vs. Court of Appeals, 235 SCRA 111)

Some lawyers prefer to use the tape recorder because it has at least seven (7) advantages. They are the following:

1. The interviewer can ask more questions in less time than the notetaker.
2. Taped interviews tend to have that crisp ring of truth.
3. The interviewer can concentrate more on the interview.
4. A taped interview reassures the interviewer that the interviewee had not been misquoted especially in controversial statements.

5. An interview can free a busy lawyer from a hectic schedule.
6. A tape recorder is of real assistance when the interviewer's hands are tied; and
7. Tape recorders can be used for recording lengthy documents. (pp. 140 -141, The Craft of Interviewing, John Brady, 1976)

G. TELEPHONE INTERVIEWING

Sometimes, a client is just too busy to see you for the legal interview. Most of the time, he will just call you up and request for an interview over the phone.

You must discourage telephone interviewing because you cannot see the demeanor and facial as well as body gestures of your client. You only rely on verbal clues and the tone of his voice which makes the interview incomplete.

However, if it is inevitable to conduct the interview over the telephone especially if your client or witness is out of town or out of the country, you must remember the following simple courtesies:

1. Speak clearly, distinctly and calmly. Try to put a friendly quality into your voice in order to establish rapport.
2. Identify your purpose quickly and succinctly.
3. Avoid making side comments during the interview. It will only prolong the conversation.
4. Don't allow long silence on the phone. If you have to take down notes, tell it to the client that you are doing so.
5. Since the client cannot see you, you must provide for verbal clues of response like, OK, I see, Ah ha... or any word which suggests that you are listening.

H. HOW TO GATHER FACTS

The object of a legal interview is to gather facts and information. There are several factors to facilitate easy gathering of facts and information. These are:

1. Ask the interviewee to help you by encouraging him to give you all the facts. The Supreme Court had once held that "lawyers do not usually present witnesses without informing themselves regarding the FACTS that they would prove in the testimonies they would give in court" (People vs. Maisug, 27 SCRA 742, 750). Of course, you have to know the difference between "ultimate facts" from "evidentiary facts." The term "ultimate facts" as used in Sec. 3, Rule 3 of the Rules of Court, means the essential facts constituting the plaintiff's cause of action. A fact is essential if it cannot be stricken out without leaving the statement of the cause of action insufficient. "Ultimate facts are important and substantial facts which either directly form the basis of the primary right and duty, or which directly make up the wrongful acts or omissions of the defendant. The term does not refer to the details of probative matter or particulars of evidence by which these material elements are to be established. It refers to principal, determinate, constitutive facts, upon the existence of which, the entire cause of action rests," while the term "evidentiary fact" has been defined in the following tenor: "Those facts which are necessary for determination of the ultimate facts; they are the premises upon which conclusions of ultimate facts are based. Facts which furnish evidence of existence of some other fact. (Tantuico, Jr. vs. Republic, 204 SCRA 428)
2. Employ honesty and affection and a little humor during the interview. Remember that interviewing a person is just like participating in a human drama.

Example:
Q: What is your name?
A: Karren Ignacio.
Q: What did you say to your lessor in connection with renting the apartment?
A: I told him I was a widow who needed a room for me and my little girl.
Q: What is your daughter's name?

A: Deng Ignacio

Q: Oh, is she your daughter by another husband?

A: No, by a friend.

Q: I see...

3. Develop and ensure trust and confidence with the client during the interview. After all, you have to remember Canon 17 of the Code of Professional Responsibility which states that: "A lawyer owes fidelity to the cause of his client and he shall be mindful of the trust and confidence reposed on him." (Cf. Tiania vs. Ocampo, 200 SCRA 472)

4. The lawyer should be as interested in the subject as he is taking notes of the interviewee's story. Look at the interviewee in the eyes to maintain rapport.

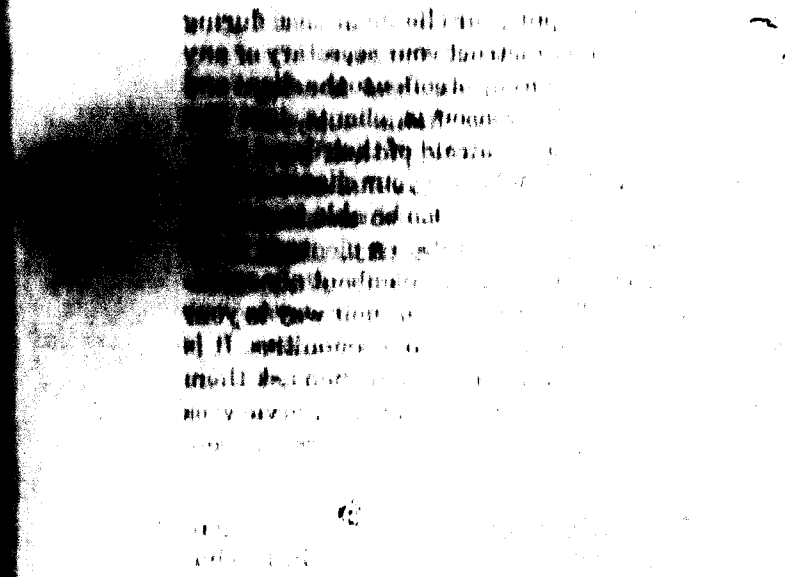
5. Use frank and simple terms not euphemisms during the interview. Evasive terms invite dishonest answers.

Example:
Counsel : What are you?
Client : A woman.
Counsel : I can see that. Are you married?
Client : No.
Counsel : Are you single?
Client : No.
Counsel : I beg your pardon. You are a widow?
Client : No.
Counsel : Then what are you!
Client : I am legally separated!

The lawyer must have simply asked the question, "what is your civil status" in this case.

6. Confront the interviewee right away (though in a subtle way) if you feel that he is telling a lie during the interview. At best, you must appraise the client that he may be charged of perjury if you prepare a sworn statement under oath and the contents thereof are

false. Tell him that perjury is the willful and corrupt assertion of a falsehood under oath or affirmation administered by authority of law on a material matter (People vs. Bautista, [CA] 40 O.G. 2491, Diaz vs. People, 191 SCRA 86, Cf. People vs. Cadag, 2 SCRA 388) and it is punishable by *arresto mayor* in its maximum period to *prision correccional* in its minimum period (one year, eight months and one day to two years and four months) under Article 183 of the Revised Penal Code and that things might work out against him if he will not tell the truth during the interview.



Chapter III

STRUCTURE OF THE LEGAL INTERVIEW

FIVE STAGES OF THE LEGAL INTERVIEW

Legal interviewing is a conversation with a purpose or an objective. Thus, you must follow five stages of the legal interview if you want to maximize the conversation. The five stages are as follows:

(1) PRELIMINARY STAGE

It is your responsibility to put your clients at ease during this stage to loosen up. You must instruct your secretary or any office staff to offer refreshments or a cup of coffee to the client and be as welcoming as possible. The reason is, clients, just like patients in a hospital are nervous or afraid of their legal problems. Animate your face, shake hands, use your client's names and look pleased to see them. You must also be able to provide a non-threatening environment and maintain a pleasant facial gesture, good eye contact, engage in small talk about nonessentials like asking about the traffic situation on their way to your office or the latest issues of the day and other amenities. It is advisable to use the surnames first of the client then ask them how they would be called later on. This lets the interviewees initiate changes if they want. If other things are worrying you, put them aside and concentrate on your client.

During this stage, explain how the interview will be conducted. You may need to explain how long it will last, what format, if any, you propose to follow and what information you will be looking for.

The early stages of the interview are critical. You must assure your client that what will be discussed are all CONFIDENTIAL and the ways which you handle any resistance or reluctance to providing information will set the tone for the whole relationship.

One of the most eminent members of the Supreme Court, the late Justice Edgardo L. Paras reminds us that:

> "Federal decisions have long given full recognition to the common law privilege against disclosure of confidential communications between lawyer and client. The obvious purpose of the lawyer-client privilege is to encourage clients to make full disclosure to their attorneys. As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." (Fisher v. United States, 425 U.S. 391, 403 , 1976)

A client has a privilege to refuse, to disclose, and to prevent any other person from disclosing "confidential" communications made for the purpose of facilitating the rendition of professional legal services to the client. Thus, a communication made as a mere friend to a lawyer or a communication relating to business without contemplation of legal advice or representation does not create the relationship. A communication is "confidential" if not intended to be disclosed to third persons other than representatives of the lawyer to whom disclosure is in furtherance of the rendition of professional legal services to the client or to those reasonably necessary for the transmission of the communication. A representative of the lawyer includes associates, secretaries, file clerks, etc. as well as the lawyer's investigator. Also included is an expert, employed to assist the lawyer in the rendering of legal services including the planning and conduct of litigation. However, an expert hired to testify at trial is outside the scope of the lawyer-client privilege. Whether the expert's compensation is derived immediately from the lawyer or the client is not material. The concept of the "confidential communica-

tions" extends to documents exchanged between lawyer and client. Thus, document created for the purpose of facilitating the rendition of professional legal services, such as a letter, is privileged in the hands of the lawyer. However, where the document is pre-existing, the document by virtue of being forwarded to the lawyer does not acquire a privileged status. (Graham on Evidence, 1986 ed.)

For the purpose of the lawyer-client privilege, a "client" is defined as a person, public officer, or corporation, association or other organization or entity, either public or private who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him. An issue arises as to who is a representative of a corporation, association, or other organization or entity, either public or private, whose communication is protected by the lawyer-client privilege. Two alternatives have been put forth. Under the control group test, representatives of the client is limited to persons having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client. Under the subject matter test, representatives of the client include employees not in the control group, if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. In Upjohn v. United States, 449 U.S. 383 (1981) the U.S. Supreme Court, as a practical matter, declared the subject matter test to be consistent with the priciples of the common law as interpreted in light of reason and experience.

The lawyer-client privilege belongs to the client, not to the attorney. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar

representative of a corporation, association, or other organization, whether or not in existence. The privilege once attaching, thus persists unless waived without regard to whether the lawyer-client relationship has been terminated. The person who was the lawyer at the time of the communication can and should claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary. Like other privileges, the lawyer-client may be claimed by its owner, whether or not a party to the litigation. (Graham on Evidence, 1986 ed.)

The lawyer-client privilege does not apply: (1) if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; (2) as to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; (3) as to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; (4) as to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients. In addition while upon the death of the client the privilege survives in favor of his estate in regard to claims by outsiders against the estate, it does not apply to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims were by testate or intestate succession or by *inter vivos* transaction. (pp. 255 to 258, Rules of Court Annotated, Vol. 4, 1991 Ed.)

(2) DESCRIPTION OF THE PROBLEM STAGE

During this second stage, let the client do the talking. Let him describe the problem. At least 60 to 70 percent of the talking should be done by the client and the remaining 30 to 40 percent is for you to make some brief, clarificatory questions. Do not take notes until you have a good understanding and grasp of the issues presented to you.

(3) CLARIFICATION STAGE

This is the lawyer's turn to talk and ask questions at length from the client based on the facts presented. Once you think that you have an understanding of the issues and problem, you can then ask questions to clarify and to search for more detail because there might be other things which the client failed to mention. There is nothing more embarrassing for the lawyer to hear "new facts" after an exhaustive interview and worse, he will hear those "new facts" from other people. Paraphrase and summarize the client's description of the problem or issues. Lastly, you must invite the client to confirm, affirm, and correct your understanding of the facts and check every information you obtained from him during the interview.

(4) ADVISING STAGE

After the interview portion and the clarificatory stage is through, you may now give a legal advice to your client. However, if the issues presented are complex or are novel and difficult questions of law, you can postpone the giving of an advice until such time that you can make a further study of the matter. However, if you are in a position to give an immediate solution to a problem, do so. Clients like to know as soon as possible what the solutions to their problems are. In the medical profession, seventy percent (70%) of doctors felt that cancer patients should not be told of the exact nature of their ilness after a diagnosis but seventy-eight (78%) of lay people felt that they would like to be told of their illness while eighty-four (84%) percent of the terminally ill said, they should be fully informed. What is true of the medical profession may be true of the legal profession especially clients who are charged of committing heinous crimes. One thing sure though. If you cannot give a legal advice right away, make a deadline for the client to return and stick to the deadline.

→ Likewise, in this stage, you must help your client reach a sound decision by identifying the advantages and disadvantages in each possible choice. The client has the final decision but you can help by pointing out all the legal angles and structuring the decision-making and evaluating options.

→ Lastly, if you feel that your client's choice, decisions, or ideas are WRONG, do not be afraid to say so, and give your reasons. After all, Rule 19.03 of the Code of Professional Responsibility says that "A lawyer shall not allow his client to dictate the procedure in handling the case."

(5) CLOSING STAGE

In the closing stage, never close an interview or meeting without giving the client:

(a) An indication of what is expected to happen next. You must be able at least to tell him simple procedural matters that will take place after you part ways in the interview portion.

(b) An idea of the expected timeframe — when you will expect to hear from the other side, especially if there is a possibility that the case might be settled.

(c) An opportunity to ask the client if there are other matters which he would like to take up, and

(d) An explanation on how you are going to charge professional fees for handling the case (especially in emergency proceedings like issuance of a temporary restraining order or an injunction). It is always advisable to make a written contract of legal services in order to bind the client and to send a letter reiterating and confirming what you previously discussed. Hereunder is a typical letter with said tenor:

November 29, 1996

Mr. Efren S. Lim
123 Roxas Blvd.
Manila

Dear Mr. Lim:

This is to confirm our discussion regarding your engagement of the Law Firm as your counsel in the following cases:

1. Lim vs. KMU

   NLRC NCR Case No. 00-12-0911123-95

2. People vs. Lim, for grave coercion
Crim. Case No. 96-43987
MTC, Manila, Branch 8

We shall handle your case upon the following terms and conditions:

1. An acceptance fee of _____ each case or _____ shall be paid upon written conformity to this Agreement.
2. Time actually spent by the handling lawyer(s) consisting of:
   a. Study of facts and all the records of the case prior to our engagement.
   b. Study of law and preparation of pleadings, motions, Memorandum, etc.
   c. Attendance of hearings
   d. Meetings held between you and the handling lawyer(s) and/or between the handling lawyer(s) and opposing counsel, and other third parties, relative to the resolution of the case shall be billed at One Thousand Pesos (P1,000.00) an hour for associates and One Thousand Five Hundred Pesos (P1,500.00) an hour for partners. A modest premium for case management and Firm responsibility shall likewise be included in your bill depending on the complexity of the issues and the degree of involvement of the Firm in handling the same.
3. A deposit of _____ shall be likewise paid upon execution of this agreement to take care of out-of-pocket expenses for transportation, photocopying, messengerial, cost of stenographic notes, and the like;
4. The above terms and conditions shall be for services rendered up to the resolutions of the cases on their present venues. Any appeal made to the higher tribunals whether during the pendency thereof or after judgment, shall be covered by a separate agreement.
5. The case shall be principally handled by the undersigned.

6. We shall be sending out our billing statements every two (2) months, or within a shorter period, if necessary to avoid undue accumulation of time charges.

If you are in agreement with the above mentioned terms and conditions, please indicate your conformity thereto by affixing your signature to the space below.

Very truly yours,

PHILIP MAURICE C. ULEP
For the Firm

Conforme:

Efren S. Lim
Client

Of course, never forget that in charging attorney's fees, you are governed by Rule 20.01 of Canon 20 of the Code of Professional Responsibility. It provides that:

Rule 20.01 — A lawyer shall be guided by the following factors in determining his fees:

a) The time spent and the extent of the services rendered or required;
b) The novelty and difficulty of the questions involved;
c) The importance of the subject matter;
d) The skill demanded;
e) The probability of losing other employment as a result of acceptance of the proffered case;
f) The customary charges for similar services and the schedule of fees of the IBP chapter to which he belongs;
g) The amount involved in the controversy and the benefits resulting to the client from the service;
h) The contingency or certainty of compensation;

i) The character of the employment, whether occasional or established;

j) The professional standing of the lawyer.

For more details regarding jurisprudence on attorney's fees, please see Chapter XI.

Checklist for taking instructions.

To recapitulate, the lawyer must be able to get the following basic data after the interview:

1. Client details:

   Name:
   City and provincial address:
   Birthday:
   Tel./Cellphone number, Beeper or Fax number:
   Occupation:
   Address of next of kin:
   How client came to consult you:
   Legal aid case:

2. Details of the case:

   Nature of the case:
   Name and address of adverse party:
   Names of witnesses, if any:
   Date and time of incident:
   Police report, if applicable:
   Weather report, if necessary and applicable:
   The need for expert witness, if necessary:

3. Checklist for interview management:

   a. Give the client a warm welcome.
   b. Adopt an open body posture.
   c. Emphasize confidentiality.
   d. Ask open questions to discover the problem.
   e. Use passive and active listening techniques to develop and maintain rapport.
   f. Observe the client's non-verbal signs.
   g. Recap the client's story.

   h. Use a mixture of probe and closed questions to clarify.
   i. Take notes at the clarification stage.
   j. Give the client a preliminary legal diagnosis of the problem, if able.
   k. Invite the client to describe what solutions or remedies are hoped for or expected.
   l. Review possible options with the client.
   m. Question for further information.
   n. Explain and discuss fees and billing arrangements.
   o. Follow up action.
   p. After the interview, send a letter confirming the instructions or agreement reached at the interview.

TYPICAL INTERVIEWING FAULTS:

When you conduct a legal interview, remember not to commit the following interviewing faults:

1. Failure to define and state clearly the purpose of the interview.

   During the interview, you will not only interview your client, but you will have to interview other people as well like corroborative or expert witnesses. As such therefore, before you conduct your legal interview, you must be able to define and state clearly your purpose or objective in interviewing that person, otherwise, the interview will result in misunderstanding and frustration and even fuzzy data.

2. Lack of preparation

   In Chapter II, preparation was discussed not only on the part of the lawyer but also on the client's side. This will hasten effective interview management. If it it were otherwise, the effect will be postponement of interviews every now and then, if not embarrasment. For example:

Q: Mr. "X", famous world traveler and bon vivant ... you've been to all the corners of the world, you've explored the bottom of the ocean, you've flown helicopters in the Alps and over Mt. Pinatubo, you've dated the world's most beautiful women and actresses in the U.S. and in Europe, you've worked in the oil rigs of Saudi Arabia — how's it feel to be one of the truly great men-about-the world?

A: Fine.

Q: Uhhhhhhhhhh....

3. Vagueness and poor grammar

Law students and even lawyers have a tendency to generalize and intellectualize. Their interview therefore lacks the drama and impact that concrete details would provide. A typical example of this is an interview in question and answer form done by a law student during his final examinations, with all the grammatical and spelling errors?

1. If I were the counsel of the client who was being framed up by the police, I will ask the following questions:

1) Q: What is your name?

A: Pedro

2) Q: How old are you?

A: Twelve years old.

3) Q: Where do you live?

A: 1715 Sobriedad St., Sampaloc, Manila

4) Q: What time of the alleged frame up happened?

A: At about 10 o'clock in the evening.

5) Q: On what day the alleged framed up, where did you came from?

A: On March 1, 1995.

6) Q: Prior to the alleged framed up, where did you come from?

A: Prior to the said frame up I was on my way going home from a birthday party.

7) Q: Where was the alleged frame up happened?

A: It was happened in Espana St., Sampaloc, Manila.

8) Q: Can you tell me the whole story in chronological order?

A: On March 1, 1995, I attended a birthday party at Florentino St., Sampaloc City. When the party was over, I went home alone. In my way, I felt urinating so, I stopped and urinated on the canal. Then came to my surpirse two policemen. They arrested me for urinating on the canal for violation of the Municipal Ordinance prohibiting urinating on pavements and any other places. At the time of the arrest, the policemen requested me to get my wallter. And when we were already at the police station, they told that they caught me with one gram of shabu.

9) Q: You have saw the policemen requested you to show up your wallet?

A: Yes, sir.

10) Q: What was your wallet contained then?

A: Identification card and P100.00 bill.

11) Q: Did you voluntarily give your wallet to them?

A: I was about to get it from my pocket then when one of the policemen grabbed the wallet from my pocket.

12) Q: After taking your wallet, what else did they do to you.

A: They brought me to the police station.

13) Q: When you were at the police station what the policemen did to you.

A: The policemen kept on telling me to admit that I have been caught with one gram of shabu.

14) Q: Did you make any admission?

A: Yes

15) Q: Did the policemen torture you to make any admission?

A: Yes.

16) Q: Are you a recidivist?

A: No.

17) Q: Are you a drug dependent?

A: No.

This is not any better from a lawyer who poorly conducted a direct examination in an actual rape case, to wit:

Q: Now, you said, now, why did Leonor Tamang took (sic) you from the room . . . I reform . . . How did Leonor Tamang took in (sic) the room?

A: He pointed a gun and took hold of my right shoulder and brought me outside the room, sir.

Q: Where did he bring (sic) when he took you out of the room?

A: He brought me to the living room, sir.

Q: Now when you were in the sala of the house of Mrs. Bacani what did Leonor Tamang and his companion do?

A. Leonor Tamang passed me to Ariel Limbauan, sir.

Q: If that Ariel Limbauan is in court were you able (sic) to point at him?

A: Yes sir.

Q: Will (sic) point to him?

A: That man, sir, wearing white T-shirt.

Q: Now, Miss Austria you stated that this Leonor Tamang forcibly took you and brought you down thereafter passed you to Ariel Limbauan is it not?

A: Yes sir.

Q: You mean to say he passed you like a ball?

A: Yes sir.

Q: To the waiting arms of Ariel Limbauan?

A: No, he gave me to Ariel Limbauan, sir.

Q: He passed your hands towards Ariel Limbauan?

A: Leonor Tamang brought me down and Ariel Limbauan was at the door at the house and when we were there, he gave me to Ariel Limbauan, sir. (People vs. Limbauan, 235 SCRA 476)

4. Asking Convoluted or overdefined questions

This takes place when an interviewer tends to make a bad speech rather than ask precise questions. This normally happens to young and inexperienced lawyers. For example: "Senator 'X', your work on the Foreign Relations Committee has impressed many of your constituents here in Metro Manila, just as I am sure it has impressed your colleagues in the Senate and surprisingly so — your home constituents in Cebu, I mean since the location of this province though picturesque and laden with beautiful women, does seem a remote from the crosscurrents of international scene as observed from the nation's capital, the result of which is to wonder if the citizens here really understand your statement last week that urged the Executive Secretary to take a harder line with violators of rights of Overseas Contract Workers, which, as I understand it, causes you no little amount of discomfort, particularly on the question of whether private Philippine lawyers should be used to protect their rights in foreign countries where they work assuming that the employment of private

lawyers abroad for OCW's is still within the parameters of Philippine foreign policy, which . . . ."

5. Failure to listen

Listening is hard work. In fact, famous CNN TV Host/ Interviewer, Larry King says that the first rule in any conversation is LISTENING. He continues, "If you don't listen any better than that to someone, you cannot expect them to listen any better to you. I try to remember the signs you see at railroad crossings in small towns and rural areas: 'Stop — Look — Listen.' " Show the people you talk to that you're interested in what they're saying. They will show you the same. To be a good talker, you must be a good listener. This is more than just a matter of showing an interest in your conversation partner. Careful listening makes you better able to respond — to be a good talker when it's your turn. He proves his point by giving an example: "When Vice President Dan Quayle was my guest during the 1992 presidential campaign, we talked about the laws governing abortion. He said it made no sense at all for his daughter's school to require his or his wife's permission for their daughter to miss a day of school, but not to get an abortion. As soon as he said that, I was curious about Quayle's personal angle on this political topic. So I asked what his attitude would be if his daughter said she was going to have an abortion. He said he would support her in whatever decision she made. Quayle's reply made news. Abortion was a Whitehouse issue in that campaign, and here was President Bush's very conservative running mate, the national Republican spokesman for his conservative wing's unalterable opposition to abortion, suddenly saying he would support his daughter if she decided to have one. Regardless of your views on that issue, the point here is that I got a response from Quayle xxx because I was listening to what he was saying." (pp. 40-43, How to Talk to Anyone, Anytime, Anywhere. The Secrets of Good Communication, Larry King, 1994)

6. Filibustering

Sometimes lawyers talk too much and a few can't resist pouring out such a continual stream of opinions and

experiences that the client can hardly come in. This must be discouraged in the legal interview.

7. Aimlessness

Some lawyers have difficulty getting and keeping the interview on the track. Rather than asking a simple, direct question, they become circumspect.

Example:
Q: How do you feel about being a hired goon?
A: I love it.
Q: What do you love best about it?
A: Having many firearms, being a spy sometimes, talking to some friends about it.
Q: What do you talk about?
A: Everything. My friends are cowards, they have no guts. They are not like McArthur, and . . .
Q: What do you admire most in Gen. Mc Arthur?

Chapter IV

QUESTIONING SKILLS

The most essential tool for the interview is the asking of questions. As a matter of fact, asking the right question is fifty percent of the answer and that he who questions much learns much.

The thoughtful interviewer will word questions so as to:

— Probe, not cross examine.

— Inquire, not challenge.

— Suggest, not demand.

— Uncover, not trap.

— Draw out, not pump.

— Guide, not dominate.

(p. 59, Balinsky and Burger, The Executive Interview: A Bridge to People, 1959 Ed.)

KINDS OF QUESTION SEQUENCES:

There are two kinds of question sequences that may be used in the legal interview. These are:

1. Funnel sequence

The funnel sequence gets its name from the shape of a funnel, which is large at the top and becomes increasingly narrow at the bottom. It begins with broad questions and moves increasingly narrow or focused. (See Figure 1)

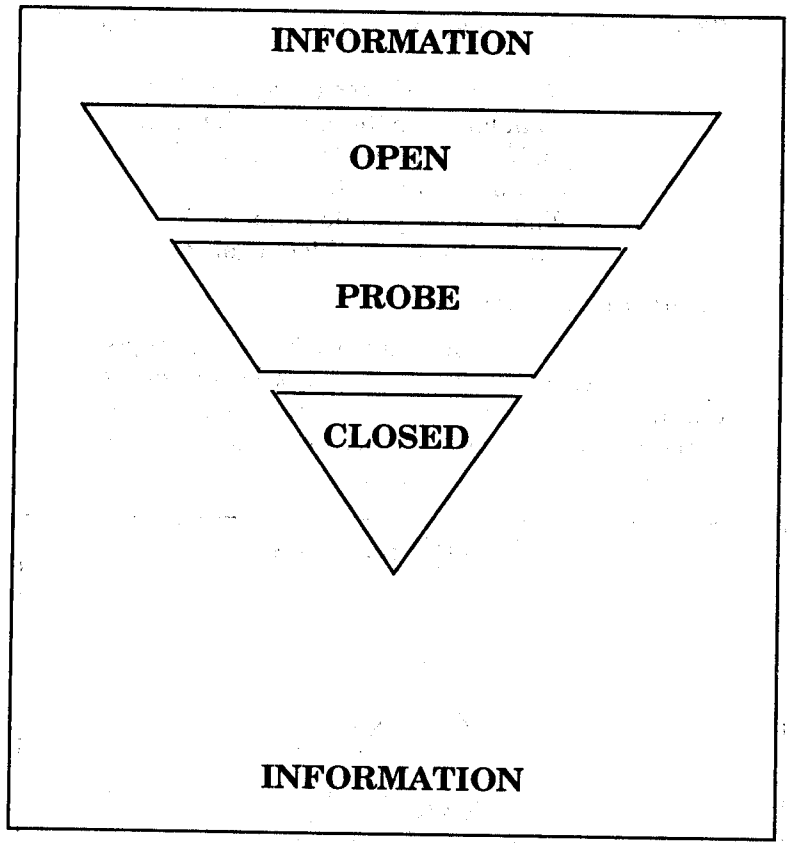


Figure 1 Funnel

The advantage of using a funnel sequence is that the initial questions are usually fairly easy to answer because they are more general, thus helping to loosen up the interviewee. Another advantage is that it allows the interviewer to uncover issues and subject areas that might be missed if the interview began with specific questions.

The funnel sequence is best used when the interviewee is willing to speak freely and is knowledgeable enough about the topic to respond well to broad questions at the outset. Using a funnel is less helpful when the interviewee is unfamiliar with the topic or wants to withhold information.

EXAMPLE: Tell me about your current job responsibilities.
Why did you choose to work in that position?
What has been the most challenging problem you've encountered in your work?
How did you handle it?
What would you do differently if you were faced with that problem again?

2. Inverted Funnel Sequence

An inverted funnel sequence is the exact opposite of the funnel sequence. The interviewer begins with specific questions then goes to more general ones. It is effective in situations where the interviewer wants to answer the question "why." (See Figure 2)

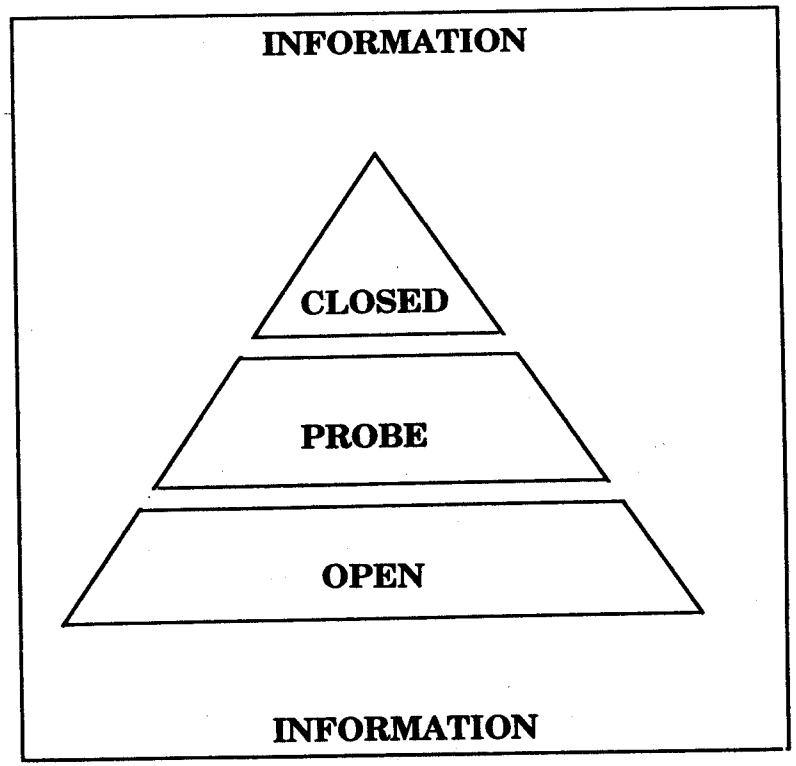


Figure 2 Inverted funnel

The inverted funnel sequence allows an interviewer to learn about the reasons for an interviewee's responses. It also makes it possible to find out what a person does or personally believes. It is helpful when the interviewee is reluctant to participate in the interview. This model however is not recommended unless you have already established a good rapport and relationship with the client.

Example: When did you first start to feel this sense of panic during the shooting incident?

Where were you when it happened?

Please try to describe your feeling to me as precise as you experienced it.

How has this problem changed the way you schedule your day?

What are the types of things that you worry about most as a result of the incident?

How do these feelings of panic fit into the rest of your life?

OTHER KINDS OF QUESTION SEQUENCES:

There are still two kinds of question sequences but they are mostly used in research and journalistic interviewing. They are:

1. Parallel Path Sequence

It employs a series of questions that are comparable in structure and scope. In this sequence, the actual order of questions is less important than the fact that they are all equally broad and narrow.

Example: Do you drink milk daily?
Do you drink orange juice daily?
Do you drink carbonated beverages daily?
Do you drink iced tea daily?

2. Quintamensional Design Sequence

It is so named because it is built around five (quinta) dimensions (mensional). This was designed by George

Gallup in 1947 as a means to gather information about the intensity of attitudes held by large numbers of people. These five series of questions always begin with (1) awareness step (2) uninfluenced attitude step (3) specific attitude step (4) reasoning step and (5) intensity of attitude step.

Example:

a. Awareness step

Tell me what you know about the University's Total Student Care Program.

b. Uninfluenced Attitude step

What would you see as this University's responsibility, if any to Total Student Care.

c. Specific Attitude step

Do you approve or disapprove of the University's current Total Student Care?

d. Reasoning step

Why do you feel this way?

e. Intensity of Attitude step

On a scale of one to ten, how strongly do you feel about this issue? (pp. 74-75, Interviewing, Art and Skill, Barone and Switzer, 1995 Ed.)

TYPES OF QUESTIONS USED IN THE LEGAL INTERVIEW:

There are many kinds of questions used in legal interviewing. They are different from those questions used in the conduct of a trial, *i.e.* direct examination and cross-examination because the latter is governed by the Revised Rules of Court. The questions commonly used in legal interviewing are the following:

1. OPEN-ENDED QUESTIONS

These are questions which allow the client to select either:

a. the subject matter for discussion or

b. the information related to the general subject which the client believes is pertinent and relevant.

EXAMPLE: Could you tell me about what brought you here today? (Thus, the word "tell me more" questions are synonymous with open-ended questions.

ANOTHER EXAMPLE: Is there anything else that you believe is pertinent to this case?

In here, there is a range of freedom for response that is left to the client. In each of these questions, the client can select whatever data appear to be pertinent.

2. LEADING QUESTIONS

Questions which suggest what the answer should be. The question makes a statement and in addition, it suggests that the client must affirm the validity of the statement.

EXAMPLES: You are related to the accused, are you not?

You drank six bottles of San Miguel beer before you drove your car, is it not?

3. YES/NO QUESTIONS

They are constructed in such a way that the client can respond with a simple, "yes" or "no."

EXAMPLES: Did you stab him?

Do you know that this guy is a drug pusher?

Yes — no questions are similar to leading questions. However, they do not suggest the answer in a way a leading question tends to do.

4. NARROW QUESTIONS

Questions which select the general subject matter. It restricts response and a particular kind of activity.

EXAMPLES: What is the color of her nipple?

How old are you?

5. PROBE QUESTIONS

Questions that dig information and facts, to get beyond potentially superficial replies. It is useful in clarifying statements and events and checking for understanding.

Example: Why did you stab him?

OTHER FORMS OF QUESTIONS:

1. INTERROGATIVE QUESTIONS — questions which expand topics — Example: "how long" or "when."

2. EXTENSION QUESTIONS — longer interrogatives — Example: "At what time of day did this happen" instead of "When."

3. MIRROR OR REVERSE QUESTION — question which uses reflection in a statement made by a client.

Example: Client : I thought of committing suicide.

Lawyer: You thought of committing suicide?

Note : This is used to show and emphasize concern.

4. SUMMARY OR CRYSTALLIZING QUESTION — it concentrates on factual content — it is a useful mechanism for confirming understanding and invites clarification.

This is useful for controlling a client who cannot stick to the point or who takes a long time to explain.

Example: So what you are saying is . . . . .

5. COMPARATIVE QUESTION — it is useful for making an evaluation on a "before-and-after" basis.

Example: How were you, financially, before your first wife died and what about after your second wife died?

6. HYPOTHETICAL QUESTION — they are used to encourage a client to express a view on the possible courses of action and solutions. They are useful for testing views and

feelings, provided the example you pose is one with which the client can identify.

Example: "What if".... or "How would you feel if" . . . . .

7. MULTIPLE OR DOUBLE BARRELLED QUESTION — a question which contains more than one question in the same sentence.

Example: "How long have you been a Jail Guard and what is your experience with prison riots."

Avoid using this because it often leads to misunderstanding. Interviewers in all situations must remember that questions should contain only one inquiry.

8. CLOSE-ENDED QUESTION — This is usually used during a cross-examination where a fact is stated and it is answerable only by "yes" or "no."

Example: You are a gay, isn't that correct?

9. COMBINATION QUESTIONS — this begins with an open question, then change the question in midway to a closed question. This is usually used by inexperienced interviewers and this should be avoided because it dilutes the effectiveness of interaction and results in lost information.

Example: Tell me about your work as a bodyguard of President Ramos, I mean did you run into trouble?

Chapter V

PSYCHOLOGICAL FACTORS THAT INHIBIT A GOOD INTERVIEW

Before or during the legal interview, you will surely encounter certain behavior on the part of the client that will, perhaps inhibit him from talking freely to obtain or get the facts as spontaneous as possible. Here are some of the psychological factors that will deter you from conducting a good legal interview.

1. The "Utang na Loob" Phenomenon — This is strictly Filipino in nature and culture where the person is hesitant to talk owing to a "gesture of kindness" extended by another person in the past especially if that person or any of his relatives and friends is involved in a case. If he talks against a person who extended kindness to him before, it will paint him as though he is an ingratiate. This has been rebuked by the Supreme Court as one which destroys our culture in the case of Morales vs. Ponce Enrile, SCRA. Cf. People vs. Lacson, 1 SCRA 414, 448)

2. Ego threat — One which will threaten self esteem, mild embarrassment, and strong feelings of shame or guilt.

   Example: Marcelina, a minor could not shamefacedly admit to her parents that she had eloped and voluntarily submitted to sexual intercourse, since that elopement must have met with righteous indignation on the part of her parents. As a result, she had no other choice but to charge the accused with rape. (People vs. Bardaje, 99 SCRA 388)

3. Case threat — Revealing the truth may be harmful to the case.

   Example: — A person accused of a crime normally puts up the defense of alibi because the admission of his presence in the scene of the crime will threaten his case (See People vs. Melicor, 160 SCRA 580) or a person accused of a crime will hide the *corpus delicti* so his case will not be threatened (Cf. People vs. Obaldo, 1 SCRA 1197, 1200)

4. Role expectations —

   Client feels inferior to the lawyer although he is a man of authority. The subordinate client must be motivated to talk freely. The lawyer's primary function is to listen.

5. Etiquette barrier —

   A client has an information that he can freely provide to somebody but not to another. Hence there are things strictly told by women to other women and men to men. This is so because the client believes that the information may be shocking or embarrassing to the lawyer.

   Example: Sgt. Paurnia investigated a murder case. He learned that the victim was savagely mutilated in her vaginal area. He may tell this to his immediate officer but it is inappropriate to tell this to a woman. What the lawyer must do is to tell the investigator that the topic is OPEN for discussion. If the lawyer does not take the initiative, the client may withhold the information.

6. Trauma — This phenomenon occurs when a person is asked to recall an experience which evokes unpleasant feelings — like anger, fear, vengeance, etc.

   Example: People vs. Jose, 38 SCRA . The rape victim was able to relate the incident to the police only three (3) days after the incident. People vs. Magdaraog, 160 SCRA 153, where the complainant did not mind going home without any underwear after the rape incident due to trauma. People vs. Telan, 5 SCRA 433, where the widow of the victim could not give a coherent narration and identify the assailants in a murder case, on the night the incident happened due to emotional shock and agitation.

7. Perceived irrelevancy — A client says "there is no reason" to provide the data sought. Or the client may say: "It is not important to you . . ."

Example: Battered women may say there is no reason to know the social status of the husband. The fact is, the latter is a wife beater.

8. Greater need phenomena — It is characterized by the client having a need or desire to talk about a subject other than that which is immediate.

Example: A client who is hungry cannot be interviewed properly because his greater need is to eat. (Cf. pp. 10-14, Legal Interviewing and Counselling, A Client Centered Approach, Binder and Price, 1977 Ed)

In all these instances, be sure to be frank with your client. Help him overcome these inhibitors by stressing confidentiality during the interview.

FIVE FACTORS TO MOTIVATE FULL PARTICIPATION IN THE INTERVIEW

On the other hand, it is also your responsibility to facilitate a good, well-rounded legal interview in the easy, relaxed way, by employing "facilitators." They are the following:

1. Emphatic Understanding

   1. Listen
   2. Understand
   3. Do not judge

   Tell words such as "Don't worry." You'll feel less angry as time goes on.

   Lawyers who develop the ability to demonstrate that they know the facts and empathize with the feelings of their clients will usually get more needed and valuable information.

2. Fulfilling expectations

   You expect some facts and information but when the client is reluctant, you have to look for motivational re-

marks saying: "I understand how hard it is to remember especially facts and figures and bad memories, I myself find it difficult and painful sometimes."

Effect: The lawyer shows empathy and understanding. But he must not stop there. He must continue motivating the client to talk and relate the incidents by all means.

3. Recognition — Giving an interviewee some sort of recognition motivates him to be more cooperative and open. Give him a direct and sincere praise. You can say: "your giving me that information is very helpful" or "Go on, please continue. . . you are doing a good job in presenting the facts."

4. Altruistic appeals — This will help him cooperate by appealing to his civic consciousness.

Example: You can say to your client "As you know, the crime rate in the community is on the rise. If you can tell me what you know, it will help to ensure identify the culprit. I'm sure you want to do your part in helping our streets and community safe and in being a good civic-conscious citizen."

or "If you can tell me what you know, then the case will be resolved on the basis of truth; none of us wants an innocent person to be convicted."

5. Extrinsic reward

If you tell the client that telling everything about the truth will help him win the case, then, he may be more than willing to talk.

LISTENING

Active listening
Passive listening

QUESTIONING:

Forms of questions:

1. Open-ended questions — questions which allow the client to select either:

a) the subject matter for discussion

b) that information related to the general subject which the client believes is pertinent and relevant.

EXAMPLE: Could you tell me a little about what brought you here today or

Is there anything else that you believe is pertinent to this case?

2. Leading questions — a question which makes a statement and in addition, suggests that the client ought to affirm the validity of the statement. It is answerable by a yes or no.

Example: You are related to the defendant, are you not?

You drank four bottles of beer before you drove your car, is it not?

3. Yes/No questions — they are constructed in such a way that the client can respond with a simple, dichotomous "yes" or "no."

Example: Were you served with a warrant of arrest by the police before they put you in jail?

Did you arrive at 9:00 a.m.?

4. Narrow questions — selects the general subject matter but restricts the response to a particular kind of activity.

Example: How was the policeman dressed?

How old is your daugther.

What was the color of her panty.

Advantages of open-ended questions:

1 It allows clients to report their observations in specific detail.

2. It increases client's willingness to give more information.

3. It facilitates communication by allowing the client to get information "off his chest."

4. It assists the client to overcome ego threat, case threat, and etiquette barrier and trauma.

Disadvantages:

1. They have a detrimental effect if the client is extremely verbose, and has a poor sense of relevancy.

2. It does not elicit sufficient detail. People often tend to provide an overview but do not provide the minute features of the facts.

3. Open-ended questions leave the client free to select any aspect of the situation he chooses to describe

Advantages of a narrow question:

1. If a client wants to avoid a sensitive topic, you can use narrow question to overcome the problem.

2. The client can respond easily to non-threatening questions.

Disadvantages of narrow questions:

1. Most of information that could be developed will be lost

2. It involves detailed probing.

Disadvantage of leading questions:

1. The probability of distortion especially if the client is unsure of the answer.

Advantage:

1. if the information is known to the client.

Three Stages of the Interview

1. Preliminary Problem Identification
2. Chronological Overview

3. Theory Development and Verification

I. PRELIMINARY PROBLEM IDENTIFICATION

The lawyer asks the client to provide a general description of the following:

a) the underlying transaction which caused the problem

b) the relief the client desires

II. CHRONOLOGICAL OVERVIEW STAGE

The client is encouraged to provide a step by step chronological narrative of the past transaction which underlies the client's problem. The client is asked to proceed from the point where the client believes the problem began, and follow through, step by step up to the present.

III. THEORY DEVELOPMENT AND VERIFICATION STAGE

The lawyer mentally reviews the entire story and determines what potential causes of action and potential defenses are possibly applicable. Using his knowledge of substantive law, the lawyer consciously asks himself "What are the possible legal theories that are potentially applicable given this factual situation?"

This is a phase devoted to exploring consciously in a systematic manner, whether or not the legal theories are viable.

How to adjourn the interview.

Chapter VI

HOW TO LISTEN

Listening is the creative, intentional, and dynamic process of selectively receiving and attending to both aural and visual stimuli for the purpose of interpreting and responding appropriately to the messages and meaning of the other. (p. 69, Listening by Wolvin and Coakley, 4th Ed, 1992). It is also the technique through which emphatic understanding is readily communicated to the client.

It might be good to know that an ordinary person can listen from six hundred fifty (650) to seven hundred (700) words per minute, but can only talk for 150 to 160 words per minute. In other words, it is very important to listen intently to a client during the interview.

Likewise, listening is identifying the "content" of the statement and the "feelings" of the client.

CONTENT — refers to the time, setting, people, and specific transactions that make up an event. In short, content refers to DETAILED FACTS.

FEELINGS — refers to the labels a person, uses to describe emotional reactions to an event. Words typically used to describe feelings include: sad, angry, anxious, disappointed, frightened, irritated, confused, happy, amused, excited, etc. (p. 21, Binder and Price, Legal Interviewing and Counselling: A Client Centered Approach)

EXAMPLES for identifying both content and feeling:

Here is a client who would initially tell you during the interview the following:

"My husband and I married six years ago but up to this time, we have no children. Then, he would come home late every night. One day, he allowed a woman to be our tenant and occupied the room next door. I never suspected that they would have a relationship later on. I can't sleep at night when he is not at home. Often when our neighbors would talk about them, I would just cry and cry. I would just sadly stay at home all day long. I never expected this turn of event."

Under the following facts, what is the content of the client's situation?

What are the client's feelings?

CONTENT: Husband did not like their being a childless couple until he developed a relationship with a tenant.

FEELINGS: Sad, sleepless, surprised, and overwhelmed.

KINDS OF LISTENING:

1. PASSIVE LISTENING
2. ACTIVE LISTENING

PASSIVE LISTENING — is listening through non-committal responses because they acknowledge that the lawyer is listening without giving any indication about how the lawyer might be evaluating the client's messages.

Examples:

"Oh"

"OK"

"I see"

"Mm-hmm"

"Interesting"

"Really"

"No kidding"

"You did, eh?"

"Ganon ba"

"Siya nga"

FUNCTION — to give the client space in an interview to freely communicate his or her thoughts and feelings. However, they do not tend to communicate that the lawyer truly understands or accepts the client's messages.

Is Silence passive listening? — YES. Silence is an important tool for the lawyer. Do not view it as absence of speech. Clients need time to think and recollect. Try to develop the ability to cope with silences and use them to enhance communication. If you have difficulty with pauses, consider counting silently to ten (10) before you ask another question.

ACTIVE LISTENING — is the process of picking up the client's message and sending it back in a reflective statement which mirrors what the lawyer has heard. This is associated with PARAPHRASING. To some, active listening is imaginative listening. Still for others, we listen with our ears but we also listen with what Reik (1972) calls our "third ear" — our eyes and our mind.

Nonverbal behavior communicates certain messages not present in verbal statements. An ability to tie together verbal and nonverbal messages allows the interviewer to hear more accurately what the interviewee means. (p. 45, Systematic Interviewing, Communication Skills for Professional Effectiveness, Dillard and Reilly, 1988)

EXAMPLE: Interviewee: This jail certainly isn't as good as my last one. The jailguards and the employees were friendly.

Interviewer: You mean, you feel rather left out here.

Interviewee: I honestly do feel that way.

In this example, the interviewer accurately decoded the message and learned what was going on inside the interviewee.

THREE PURPOSES OF PARAPHRASING IN THE LEGAL INTERVIEW:

Paraphrasing is a basic listening skill. It tells the interviewee that you are actively hearing what she is saying. It checks out perceptions and understandings especially if you are dealing with people from different provinces or countries. It has three purposes, to wit:

1. To communicate to the interviewee that the lawyer is trying to understand what is being conveyed;
2. To clarify the lawyer's understanding of the client's message, and
3. To highlight a specific issue or communicate more precisely what the interviewee is attempting to convey.

CHARACTERISTICS OF LISTENING:

1. Listening is Creative

   Listening involves bringing our imaginations, past experiences, and knowledge to bear on the stimuli we receive for the purpose of understanding.

2. Listening is Intentional

   It is impossible to listen unless we intend to do it. The word intend comes from the Latin word *intendere*, which means to stretch toward or aim for. We can hear without intending to do so, but the act of listening requires the purposeful reaching for meaning. In the same way, we can receive visual and other stimuli without focusing on them, but it is the act of focusing that brings our organizational and interpretative powers into play.

3. Listening is Dynamic

   Listening involves energy and life. Listening is not a passive process. The Greek root word for dynamic means powerful. Listening is a powerful act.

4. Listening is a Process

   Listening is never an instantaneous act. It is ongoing and occurs over time. It involves refinement and exchange.

5. Listening is Selective

   We hear or see (receive) and pay attention to (attend to) aural and visual stimuli selectively. The process of listening, like the process of perception, is always selective; we never listen to everything that is going on around us simultaneously. There are always more sounds, movements and thoughts surrounding us than we can assimilate. As listeners and perceivers, we continually edit out those sights and sounds that are not of interest or which we do not need to hear. Sometimes, we consciously decide to pay attention to certain stimuli and ignore others, and sometimes we filter out unwanted information without even knowing we are doing it.

6. Listening Is Visual as well as Aural

   Listening involves our eyes and minds as well as our ears. As will be discussed in Chapter VII, much of the information we send to one another is not carried on soundwaves but in nonverbal messages such as facial expressions and body gestures.

7. Listening involves Interpretation

   Listening involves interpretation. Not only do we pay attention to necessary aural and visual stimuli as we listen, but we also strive to make sense of what has been communicated. It is through our interpretation of stimuli that we give meaning to the sights and sounds we receive from the world around us. All communication involves interpretation, although successful communication involves accurate interpretation of the messages received.

8. Listening involves Response

   Listening to another, taking in, receiving, or accepting from another are often seen as passive. However, they all generate a response, for one never merely passively receives, one also reacts. The reaction can take many

forms. Listening involves responding appropriately to the communication of another. (pp. 33-35, Interviewing — Art and Skill by Barone and Switzer, 1995 Ed.)

HOW DO YOU ACTIVELY LISTEN?

One must not merely parrot and restate the words but the lawyer must be able to restate and reflect back the meaning of the problem to the client.

One must listen to the story that the client is telling; to see and understand the plot in the story, no matter how perverse, twisted, or unbelievable it may be.

Another way to do it is to pay attention to what the client needs and to what she means.

Example: Case of legal separation: ground is unusual sexual practise: *"Alam niyo attorney, ang asawa ko, kung dumating sa bahay galing sa kung kahit saan hahalikan ako, kahit sinong kaharap, hinihipuan niya ako sa buong katawan, tapos pag gabi, nakaka-limang putok, pagkagising ng umaga, makadalawa, tapos pag Sabado at Linggo halos oras-oras akong ginagamit — patiwarik, patagilid, at kung ano ano pa.*

Answer: Ah — ibig niyong sabihin ay "Malibog" siya.

This is an emphatic response on the part of the lawyer. If the client will respond in the affirmative, then you were able to know what the client was really up to.

Active listening is characterized by introductory statements like "So you felt that" .... or So it seems to you that .... "As I understand it .... or if I've got it right .....

The FUNCTIONS or importance of active listening are:

(1) it explicitly communicates that what the client said was actually heard and understood.

(2) it constitutes an explicit form of expression, demonstrating lawyer comprehension.

(3) it carries with it greater implication of non-judgmental acceptance than do passive remarks such as "Oh, I see" or "Mh-hmmm."

(4) it is used to mirror both content and feelings.

(5) it stimulates full client participation in the interview.

(6) To helps the client feel free to discuss and reflect upon his/her problem in a comfortable and open manner. In short, active listening is used to develop rapport.

HOW MUCH ACTIVE LISTENING SHOULD BE EMPLOYED?

It depends.

Professional listening is a skill which can be developed. To be a good listener requires the following:

1. concentration
2. active participation
3. watching for non-verbal signs
4. taking account of feelings as well as the legal content of what the client says
5. Practise

BARRIERS TO EFFECTIVE LISTENING:

Be that as it may, there are also things that would inhibit good listening during the interview. They are as follows:

A. ENVIRONMENTAL BARRIERS:

1. Poor room lighting
2. Uncomfortable or inadequate seating and spatial arrangement *(i.e.*, lawyer and client is seated too close or too far away)
3. Room temperature *(i.e.*, too warm or too cold)
4. Sound distractions (background music, voices in the adjoining room, irritating sound of motor vehicles, a

jackhammer pounding on the pavement of the street, etc.), beepers, telephone, or cellphone ringing.

5. Visual distractions: cluttered desks or tables, movement of persons in the interview setting, a television set is on.

B. PSYCHOLOGICAL BARRIERS:

1. Imbalanced mental state
2. Unwillingness to participate
3. Headaches, stomach aches, drowsiness, hearing disorder
4. Overworked or emotionally stressed. (Cf. People vs. Biago, 182 SCRA 411)
5. If the subject matter is unusual or boring.
6. Difference between speed of thought and talking speed. The average person speaks about 125 words a minute whereas most people think at approximately 500 words per minute. If you cannot slow down your thought processes to concentrate on the speaker, you will be distracted.
7. Lack of interest in the content or negative reaction to the speaker or speaker's behavior or physical appearance. (Example: the client is dressed in a lousy, "promdi-look" suit)

C. CULTURAL AND PROVINCIAL OR REGIONAL BARRIER:

1. Dialect barrier — it takes place when a client from another region or province in the country speaks a different tongue with different word meanings, pronounciations, and accents or patterns of speech;
2. Non-verbal barrier — when the client has a different norm about time, space, or the interpretation of gestures, eye contact, bearing, etc. (Cf. People vs. Germino, 133 SCRA 827 where it was taken judicial notice of by the Supreme Court that rural folks retire for the night earlier than city dwellers)

3. Belief and value differences exist when the client has a different belief about reality, society, roles of men and women, work, family, etc. (See People vs. Bondoc, 232 SCRA 478, People vs. San Gabriel, 235 SCRA 80, People vs. Damiar, 127 SCRA 499)

CHECKLIST FOR GOOD LISTENING:

1. Keep an open mind — do not be judgmental.
2. Assess the content not the delivery.
3. Listen for the main idea.
4. Be flexible.
5. Prevent distractions.
6. Capitalize on thought speed — do not allow your thoughts to wander.
7. Identify the feelings behind the content.
8. Mix passive and active listening techniques — nods and noises with verbal feedback.
9. Reflect back meaning not words.
10. Remember — silence is golden — use it constructively. (p. 19, Effective Interviewing, Helena Twist, 1992 Ed.)

Chapter VII

TRANSFERENCE AND COUNTERTRANSFERENCE

When we talk about the feelings of a lawyer for and about a client (and feelings against the client), we have entered the realm of transference and countertransference.

This is a Jungian (Carl Gustav Jung) and Freudian term for psychotherapists and psychoanalysis.

Countertransference is a prototypical form of reaction and one that helps explain why one reacts as he does to clients in general and to a particular client.

This is very important for lawyers to let them realize how they deal with their respective clients especially because there are different kinds of clients. This is also important to make lawyers understand how they might influence interactions with clients and how he might make good use of said feelings as they go along.

The manifestations of countertransference are as follows:

1. Feelings of discomfort during or after the interview with the client.
2. Carelessness and discourtesy toward the client such as being late for appointments or making appointments that are inconvenient for the client.
3. Strong affectionate feelings for the client — which are usually recognized when the client is of the opposite sex.
4. Inclinations to boast to colleagues or client on the importance of the matter the client brings in.

5. Avoidance of the client and neglect of his case.
6. Gossip with others about the client.
7. A tendency to hammer away at minutiae beyond the scope of even the most intelligent lament. This is a manifestation of aggression with a client who is dissatisfied with the lawyer.
8. Boredom, drowsiness, and anxiety. (pp. 67-68, Legal Counselling and Interviewing in a Nutshell, Shaffer and Elkins, 1987 Ed.)

TRANSFERENCE — is an unconscious psychological need or the strong feeling of the client for the lawyer (helper).

— this is a psychotherapeutic relationship in which one person becomes dependent upon another or where one person in a relationship is viewed as an authority figure.

— this is commonplace in law offices because the client develops a SAVIOUR COMPLEX in the lawyer.

FOUR INDICATIONS OF TRANSFERENCE:

1. desire for dependence accompanied by deep feeling
2. fear of the counselor which is related to fear of parents
3. attitudes of hostility, related to experience and
4. expressions of affection and a desire for love relationship

— we talk of transference if there is "dependence" of one to the other — common in any other profession where there is "dependence" or "helping" relationship. (Minister, doctor, dentist, etc.)

THE MEANING OF BODY LANGUAGE IN THE LEGAL INTERVIEW

Body language is described as a language of signals. It is

what we say without speaking and it is manifested through gestures and movements.

It is often said that the body language of a man communicates his inner feelings. As a matter of fact, there are around seven hundred thousand different body signs that the body can manifest in different situations. In the interview, remember that seven (7%) percent of a conversations meaning exists in what you talk about, thirty-eight (38%) percent on how you say it and fifty-five (55%) percent in your attendant body language.

It is important to take notice of the body signs or languages during the interview because what the client is saying may be different from his corresponding body language. It is important to remember that one cannot fake nonverbal communication signs. It is in this aspect where the lawyer must be very observant of body signs during the legal interview. He must watch his client closely while he talks because body language is a major means of communication. As a matter of fact, even the Supreme Court has once gone into the realm of "behavioral psychology" in appreciating facts in a case (People vs. Ibay, 233 SCRA 15). The following must help you decode the meaning of some common body movements.

TYPES OF NON VERBAL COMMUNICATIONS:

1. Facial expression
   a) Dagger look — a look that could kill
   b) A fish-eye look — sleepy look
   c) I'm available look — looks at you with cute looks
   d) Poker face (stoic expression, blank look or zero disclosure look)
   e) Those who look away when speaking are not sure of their opinion
   f) Those who look at others can support the validity of what they say and appear more competent
   g) Those who look at the floor are overcautious and try to avoid new ideas, experiences or risks

   h) The more popular a person is within a group, the higher the level of eye contact.
   i) An open look comes from an open person
   j) Direct look — it conveys genuine interest in and respect for the other person.
   k) Vacant look — the eyes seem to be fixed on an imaginary point in the distance. The person with this look talks "round" other people and the subject. This may result in monologues.
   l) The sidelong glance — a look over the shoulder makes it possible to observe others without being noticed oneself. It signals distrust, perhaps skepticism. Half shut eyes can create the impression of veiled threat.
   m) Look towards the sky — implies absorption in prayer and devotion. It implies for a request for help.
   n) Smile and laughter
      1. Simple smile — means a person is happy with himself
      2. Upper smile — is a greeting smile when friends meet
      3. Broad smile — it is associated with laughing and eye to eye contact normally occurs
      4. Oblong smile — means one who pretends to enjoy a joke, or when a girl is being chased around the office by the boss
      5. How do you do smile — a non-sense smile. It occurs when he is happy by himself.
      6. Lip-in smile — implies that the person feels in some way subordinate to the person she is meeting.
      7. Ha-ha laughter — one is happy with the world. It is free, open, and hearty.

8. He-he laughter — you laugh about somebody or something even if the person concerned does not understand the joke.

9. Hee-hee laughter — sounds more like a secret giggle. It is usually connected with irony.

10. Ho-ho laughter — conveys surprise and lets the listener know that the person laughing does not really believe what he has just heard. It also means to express critical astonishment or protest.

11. Smirking is a form of laughter with lips pressed together expressing a certain resoluteness. It is sort of a secret laugh, the source of amusement being known only to the smirker.

p) Lip biting — disappointment
q) Rubbing one eye — deceit
r) Lip licking — nervousness
s) A jutting chin — belligerence

2. Walking gestures:

a) Dejected walker — dejected walker tends to be critical and secretive; he plays a devil's advocate.

b) Burst of energy walker — he is a goal-oriented person and readily pursue objectives.

c) Hands on hips walker — one who wants to short cut to reach his goal faster, exemplified by the late Winston Churchill.

d) Strutter — a pompous person. This is characterized by a raised chin; arms exaggerated and self-satisfied — best exemplified by Mussolini.

e) Pre-occupied walker — one who walks with head down, hands clasped behind his back. He is the meditative type of person.

3. Shaking hands:

a) Ordinary handshake — palm to palm — shows friendship and courtesy;

b) Politicians handshake — palm to palm coupled with the other hand cupping over the other person's hands or touches the shoulder.

4. Open cluster gestures:

a. Open hands/palms — it means sincerity; honesty

b. Shoulder shrugging gesture — to show emotion — indicates open nature of the character;

c. Unbuttoning coat — a person who is easy to deal with.

d. Thumbs up — good job

e. O sign — A — OK — good job

f. V sign — victory

5. Defensiveness:

1. Arms crossed on chest — it communicates belligerence or defensiveness.

Variations: fist and knuckles held under the armpit: it shows protective postures

2. Sitting with a leg over the arm chair, even if person is smiling — that person is not cooperative or hostile to other person's needs or feelings. He is a person difficult to relate to.

3. Sitting, chair back serving as a shield — shows dominance or aggression.

6. Crossing legs

a) Leg over leg

b) Figure four position — both means you are in a competition and need amount of attention. To some lawyers, it means you are lying.

c) Woman in a leg over leg position and kicks one of her legs gently — it means she is bored.

7. Evaluation gestures

a) Hand to cheek gesture — thinking

b) critical evaluation gesture — thought patterns are critical (negative)

c) Head tilted — listening intently

d) Stroking chin — let me consider or making a judgment

e) Pinching the bridge of the nose — it communicates great thought and concern about the decision to be made.

f) Touching or slightly rubbing the nose — sign of rejection — it means NO.

8. Use of eyeglasses:

a) Dropping eyeglasses to lower bridge of the nose evaluating gesture that causes negative emotional reaction especially when the person stares or looks down upon you.

b) Cleaning eyeglasses — procrastination

c) Put eyeglasses in the mouth — gain time to think

d) Throw it on the table — signals emotional outbreak

9. Other common gestures:

a. Hands on hips — desire to be ready and able

b. Sitting on the edge of a chair — communicates eagerness

c. Arms spread while hands grip the edge of the table — it means — listen to me — I have something to say

d. Bite nails — shows worry or concern

e. Kick lightly — frustration

f. Deep breath and release air slowly — sorrow or high emotion

g. Tsk-tsk sound — disgust; astonishment

h. Clenched fist — determination; anger and possible hostile action; extreme emphasis and a gesture of defiance

i. Pointing index finger — gesture of hostility

j. Palm to back of neck — pain in the neck

k. Kick at an imaginary object — angry or generally irritated

l. Steepling — confident — sure of what he is saying

m. Feet on desk — dominance or ownership

n. Leaning in vehicle — pride and possession

o. Clearing throat (hrrrmmm sound) — nervousness

p. Whew sound — task or obstacle has been overcome

q. Whistling — comfort (shows variety of feelings)

r. Jingling money in pockets or tin can — concerned with money or the lack of it.

s. Locked ankles and clenched hands — designates holding back and strong feelings of emotions (i.e., when you are seated in the dentist's chair)

t. Drumming on table — bored; impatient

u. Blank stare — looking at you but not listening

v. Hand to chest — communicates loyalty; honesty and devotion

w. Delicate balancing of a shoe on the toe of one foot — "you're making me feel comfortable in your presence"

x. Sitting with one leg tucked under them — she is comfortable talking with you

y. Rubbing of palms — expectation; excitement

z. Crossing the middle finger over the index finger — a magic gesture — a defense against evil; a hope for good luck

aa. Hands in lapel of coat — humble as I am.

bb. Covered hands — it conceals feelings and covering insecurity. He is difficult to deal with and keeps his distance.

cc. Clinging hands — those who cling to files, tables, chairs or armrests — are afraid of the present situation and do not know how to cope with it.

dd. Twisted hands — people who twist their hands are usually complex personalities. Twisted hands also indicate a difficult emotional life.

ee. Upward index finger — it conveys strictness — like teachers.

ff. Lowered index finger — the tip of a slightly bent index finger tapping vigorously on the table wants to emphasize something.

gg. Index finger across mouth — a sign of restraint; to shut your mouth.

hh. Fingers covering the mouth — regrets something that should not have been told.

ii. Index fingers meeting — fingertips come together in a point, a kind of arrow, pointing forward — used by self-confident people with a tendency toward arrogance.

jj. Failure on the part of the accused to make a protest during an arrest indicates his guilt.(People vs. Marcos, 185 SCRA 154)

Based on the experience of this author, it is best to tell and appraise the client during the interview, to be aware of his corresponding body and facial gestures during the trial. Note that the Judge is also observing the DEMEANOR of witnesses during the trial proceedings and he has his own way of interpreting the facial expression, tone of voice and body movements of the witness. In other words, this may help spell the difference in winning a case. Thus, in so many cases, the Supreme Court had always ruled that the findings of facts of the trial court with respect to the credibility of witnesses command great weight and respect (People vs. Tuscano, 137 SCRA 203, People vs. Bernal, 131 SCRA 36, People vs. Ramos,

153 SCRA 276, Pan Am Airways, Inc. vs. IAC, 153 SCRA 521, People vs. Curiano, 9 SCRA 323, Olondiz, Jr. vs. People, 152 SCRA 65). The reason is, trial courts have the privilege of examining the deportment and demeanor of witnesses and therefore can discern if such witnesses are telling the truth or not (People vs. Natipravat, G.R. No. 69876, November 13, 1986, People vs. Ramilo, 147 SCRA 102, People vs. Aboga, 147 SCRA 404, People vs. Pilapil, 147 SCRA 528, People vs. Sarmiento, 8 SCRA 263, People vs. Sunga, 154 SCRA 264, Go Ong vs. Court of Appeals, 154 SCRA 270, Moncada Bijon Factory vs. CIR, 4 SCRA 756, Tuazon vs. Luzon Stevedoring Co. Inc., 1 SCRA 189, People vs. Errojo, 229 SCRA 49, People vs. Gomez, 229 SCRA 138, Lim vs. Court of Appeals, 229 SCRA 616). As a matter of fact, decisions of administrative officers shall not be disturbed by the courts except when the former have acted without or in excess of their jurisdiction or with grave abuse of discretion (Commissioner of Customs vs. Valencia, 54 O.G. 3505. Cf. Kaisahan ng mga Manggagawa sa La Campana vs. Tantongco, 6 SCRA 569, Vda de Farinas vs. Estate of Florencio P. Buan, 3 SCRA 471) and that findings of facts of quasi-judicial agencies, like the National Labor Relations Commission are generally accorded not only respect but at times, even finality. (Lacoste vs. Inciong, 166 SCRA 1, Batangas Transportation Co. vs. Perez, 11 SCRA 793, Heirs of Zoilo Llido vs. Marquez, 166 SCRA 61, San Miguel Corporation vs. Javate, Jr., 205 SCRA 469).

Lastly, the Supreme Court affirmed the findings of a very observant Justice Jaguros, who denied the custody of a child to his mother taking into consideration the actions and demeanor of the latter during the oral argument before the Court of Appeals in the case of Sombong vs. Court of Appeals, 251 G.R. No. 111876, Jan. 21, 1996.

"The undersigned *ponente* as a mother herself of four children, wanted to see how peti-

tioner as an alleged mother of a missing child supposedly in the person of Cristina Neri would reach on seeing again her long lost child. The petitioner appeared in the scheduled hearing of this case later, and she walked inside the court room looking for a seat without even stopping at her alleged daughter's seat; without even casting a glance on said child, and without even that tearful embrace which characterizes the reunion of a loving mother with her missing dear child. Throughout proceedings, the undersigned *ponente* noticed no signs of endearment and affection expected of a mother who had been deprived of the embrace of her little child for many years. The conclusion or finding of undersigned *ponente* as a mother herself, that petitioner-appellee is not the mother of Cristina Neri has been given support by the aforestated observation."

SIGN LANGUAGE

Body language is different from sign language. The latter refers to the manner by which people who are handicapped, say the deaf and the mute will communicate. Still others are just stupid to interpret the meaning of signs without properly confirming what it means. If you have clients or witnesses in this category, you must be able to get an accredited and expert witness to interpret the meaning of the sign language. The erroneous interpretation could be fatal especially if it will be utilized in court.

PEOPLE VS. VALERO
112 SCRA 661

FACTS: On February 22, 1969, two children of Ceferino Velasco died of poisoning after eating bread containing endrin, a commercial insecticide while another child would have died were it not for timely medical intervention. Three puppies who also ate the poison laden bread died too. Thereafter, accused Lucila Valero was charged of the complex crime of double

murder and frustrated murder and the trial court imposed the penalty of death. The basis of the death penalty was through the testimony of a deaf mute named Alfonso Valero alias Pipe, brother of the accused, Lucila Valero. The prosecution witnesses tended to prove that it was the accused, Valero who instructed Alfonso Valero alias Pipe to give the poisoned bread to the three children. During the trial, the testimony of Alfonso Valero through sign language, is as follows:

"Q. Will you please stand up and demonstrate to this Honorable Court how you talked to him (Pipe) through signs?

A. When I went down, I made this sign to him (Witness was waiving his two hands with his palms down and both hands horizontal along the waist)

Q. When you made that sign, what was the meaning or idea that you wanted to convey?

A. I was asking him as to what happened to the children and the sign made by him was like this. (Witness demonstrated by one of his hands demonstrating some kind of height and at the same time the left hand pointing upwards where the children were.)

xxx xxx xxx

Q. What do you mean by the sign when your right hand indicating some height and your left hand pointing towards upward?

A. What I wanted to imply is, I was asking Pipe as to who gave food to them, your Honor.

Q. Why did it occur to you to go down and try to communicate with Pipe?

A. I saw him down below and he was making signs and I asked the children as to what happened and he told me that the children were given bread.

Q. What came into your mind when you saw Pipe demonstrating in the manner that you described?

A. I just wanted to know as to who gave food to the children, your Honor.

Q. Did you catch any significance in those signs that you saw to Pipe?

A. Yes your Honor.

Q. What significance that you had in mind?

A. Because the children said that it was Pipe who gave bread, your Honor.

Court:

Proceed

Fiscal Calderon, Jr.

Q. When you made that sign pointing one hand upward, what was the answer of Panchito?

A. I inquired from him through signs as to who gave bread to the children by demonstrating like this (witness demonstrated by seemingly eating something inside the house with his right hand and his left hand index finger towards the front and then pointed towards his left index finger)

Q. Towards what direction was Panchito pointing his index finger?

A. To the sister, sir.

Q. And who is that sister?

A. Precila (sic), sir. Precila (sic) Valero.

However, it was admitted by the prosecution witnesses (Ceferino Velasco and Federico Jaime) that the interpretation of the sign language of Mr. Alfonso Valero alias Pipe was merely guess work. Nevertheless, the trial court convicted the accused based on the following observation:

> "There is something disquieting about those seemingly unfading smiles on the face of the accused; with her sharp, penetrating look, her unsolicited smiles are clues to real personality; they forebode some out-of-the-ordinary dispositions in the inner recesses of her mind; perhaps only a trained psychiatrist or an experienced psychologist could fathom or decipher the meaning of this characteristic of the accused; it is unfortunate that the prosecution and the defense have chosen not to delve into the personality of the accused; however, because of these queer manifestations on the facial expressions of the accused, could she have intended to produce the gravity of her felonious act; had she a fore-knowledge that the poisons used to kill rats or insects would also have cause death to the children. Was her intention merely to cause some malady or discomfort to the children to shout and vent her hatred on the mother of the children? These are some questions that find no definite answer from the records of these cases; these questions notwithstanding, the court strongly feels that it is not entirely improbable for the accused to possess a violent or cruel disposition xxx"

RULING: It is most unfair for the trial Judge to unexpectedly spring the aforementioned observation in his decision without having mentioned it in the course of the trial. Such a procedure is unfair to the accused, for she is thereby deprived of her chance to either deny or affirm the truth of such a very material finding which has important bearing in the judgment. This procedure of the trial Judge practically denies the accused the right to due process. The surprising finding of the trial Judge goes far beyond mere observation on the manner a witness testified, which admittedly may be considered subjectively by the Judge in evaluating the credibility of the witness. The surprising finding of the Judge relates not only to the credibility of a witness but to the sanity of the defendant. The accused was ACQUITTED.

PEOPLE VS. MAISUG
27 SCRA 742

FACTS: At nine o'clock in the evening of February 17, 1962, the appellant Herminigildo Tado, the other accused, Maisug, Regino Gala and three others were playing a card game known as "pares-pares." Tado was the banker. After about an hour, several players including Gala lost and in apparent disgust, tore one of the cards. This angered Tado as a result of which verbal altercations followed. Suddenly, Maisug stabbed Gala at the back from behind with his knife. Gala died after a commotion

and was found dead at a distance of 15 meters from the gambling house. Maisug surrendered to the police and admitted having stabbed Gala. Earlier that evening, Tado instructed Gala to stab anyone who would make trouble during the card game, and so, when the deceased Gala tore one of the cards and Tado signalled him, he immediately drew his knife and stabbed the victim. Their playmates executed their respective affidavits without mentioning the alleged "signal" allegedly given by Tado to Maisug. After an information for murder was filed against Tado and Maisug, trial ensued and a decision was rendered thereafter convicting Maisug to suffer an imprisonment of eight years only since he pleaded guilty to the charge. With respect to Tado, he was found guilty as principal by induction and was sentenced to life imprisonment. On appeal, Tado assigned five errors of the trial court, among them of which is the lack of proof of murder by inducement apparently harping on the non-existence of the alleged "signal." Thus:

"Q. — Why do you say he agreed with an angry mood?

A. — He agreed with a nodding sign, but with a signal to Anastacio Maisug.

Q. — What signal?

A. — With a sign doing this. (INTERPRETER: Witness holding his right, standing, with fist closed and making a stabbing motion, thrusting forward)" (TSN, p. 4, Perez)

"Q. — You mentioned Anastacio Maisug being signalled by Herminigildo Tado with a stabbing motion. What did you understand by that?

A. — I do not know the meaning of it" (TSN, pp. 4-5, Perez)

xxx xxx xxx

"Q. — When you said Mr. Tado made a forward motion of his hand, you did not know what that meant. Is that not right?

A. — You are right.

Q. — As a matter of fact, you did not even know that that was a signal?

A. — When he made a sign in this manner (INTERPRETER: Witness made a thrust) immediately Rodolfo Bregente ran away.

Q. — But you did not know for a fact that that was a signal? (later) Please answer my question.

A. — I do not know. In that sense.

Q. — And the next thing that you saw was Mr. Rodolfo Bregente was running in that direction?

A. — That is why I turned to one side.

Q. — And when you turned your head you saw Mr. Anastacio Maisug stab Regino Gala?

A. — I did not see. You are right.

Q. — As a matter of fact, you do not know for a fact that Anastacio Maisug stabbed Regino Gala in response to the supposed signal of Mr. Herminigildo Tado?

A. — What I know for a fact is that when the signal was made, there was a commotion at once and that means there must be a stabbing.

Q. — But you did not actually see the exact moment when Anastacio Maisug stabbed Regino Gala?

RULING: Accused is acquitted. To convict an appellant on mere vague testimony about a signal is conviction on mere inference.

Relative to this case is also another Supreme Court ruling which teaches us to be careful about interpreting the behavior of people. It recently held that an indifferent behavior of a person at the wake of his wife is not a proof that he killed her, (People vs. Lasac, 148 SCRA 635) in the same manner that the gesture of a dying person pointing to a certain direction is not to be given much probative value to implicate the accused of a crime, since this is not tantamount to a dying declaration (People vs. Ola, 152 SCRA 1).

Chapter VIII

COPING UP WITH DIFFICULT SITUATIONS

In some instances, you will be dealing with some extraordinary clients who are either indecisive or do not know what to do in their respective cases. This includes the following:

I. DEALING WITH RELUCTANCE

Reluctance is the unwillingness to provide full information in a particular case or situation.

Reluctance comes in two ways:

1. The topic may be discomforting for the client and
2. Observations of the client's demeanor may indicate reluctance.

Example: In medical malpractise cases. A doctor may be reluctant to be interviewed because he knows that he was negligent in conducting a diagnosis on a patient, and he will appear criminally liable therefrom.

Another example: On demeanor which is ego threatening. Your client might have bought a carnapped car and he will be reluctant in the interview because he will appear stupid. Non-verbal signs may indicate uneasiness — such as shift in position or facial expression. So you can say: "You look uncomfortable. Is there anything that is bothering you?"

Technique in handling client reluctance:

1. Ignore it or postpone it.
2. Employ a motivational statement.

   A Motivational statement has two aspects:

   a) the lawyer expresses emphatic understanding of the feeling of the client and

   b) utilize a facilitator, usually a "reward" to point out the benefit the client will receive by overcoming the inhibitor.

   Example: You can say: "The way you can help best yourself is by letting me know what happened."

   Even the Supreme Court had once stated that the initial reluctance of witnesses to report a crime is understandable.(People vs. Pacia, 186 SCRA 529) The reason is, the witness will fear that he may become the next victim if he will volunteer an information (People vs. Munoz, 107 SCRA 313). If that happens, try to give your client some motivational statements for him to open up and talk.

3. Stress confidentiality.

   In using motivational statements, stress confidentiality of the communication.

4. Change the question pattern.

   Either use narrow questions or open-ended questions because they are easy to answer.

II. HOW TO DEAL WITH FABRICATION

Fabrication is the giving of false information and withholding of information.

Example: Mr. Rodriguez says that he was shooting a dog who got his kettle of fish, but in truth and in fact, shot the victim, as testified to by some witnesses. (See People vs. Rodriguez, 119 SCRA 254)

You have to understand that this is an intuitive one.

The principal cases of fabrication are case threat and ego threat.

How to determine fabrication. — You can determine fabrication easily if the client's answer contains internal inconsistencies, fantastic and utterly incredible stories which are contrary to human experience, against the natural course of things and contrary to reason and common sense. (See People vs. Fabro, 191 SCRA 386)

However, the failure of a witness to look at you in the eyes and speaks in a low voice is not indicative of fabrication. (People vs. Arcamo, 105 SCRA 707)

TECHNIQUES FOR HANDLING FABRICATION:

1. Build general rapport (by active listening and providing recognition)
2. Topic avoidance — you can skip the topic especially if it is ego threatening or case threatening — until such that time that you develop rapport. The subject can be returned to at a later time.
3. Disclosure — frequently, the lawyer will, in advance, come into possession of information which suggests a particular topic to be threatening to the client's ego or case. If confrontationally done, the client might deny the existence of the data. To disclose the topic directly might damage the relationship between the parties.

   Example: (While you are interviewing your client)

   The Probation Officer indicates that you have a prior conviction for robbery. I would like to know whether or not you were assisted by counsel at that time.

   By framing such a question, you will not directly hurt or insult your client by saying and concluding that he is a robber.

4. CONFRONTATION

   Confrontation has two kinds. They are direct and indirect.

   Direct confrontation involves express statement of the lawyer's disbelief: e.g. "I don't believe that."

   Indirect confrontation takes place when you look at your client in the eyes and suggest that he or she is telling a lie. This way, the client may fear that his relationship with you will be terminated at once or that he/she may feel guilty with the way you look at them.

FOUR TECHNIQUES IN DIRECT CONFRONTATION:

1. Lawyer request for clarification — it involves articulating the clues that suggest fabrication really exists and asking the client unravel the lawyer's confusion.

   Example: "I'm a little confused. One time, you indicated this happened at 10:00 a.m., another time you said it happened at 6:30 a.m..

   Can you clarify this obvious difference for me?"

2. Confrontation through the medium of a third person:

   This technique involves putting before the client a version of the incident which contradicts the client's version, and then asking the client to explain. The lawyer structures the dialogue so that it appears that a witness or an adversary lawyer is contesting the client's version.

THREE FORMS OR WAYS:

1) Have the client set forth the client's perception of the adversary's position.
2) Have the client refute the adversary's version

   Example: The client claims injury but expert medical opinion is to the contrary. The expert opinion

is put before the client, who is asked to explain. Again, the form is always — "This is what THEY are going to say..."

3) Tell the client that he/she is going to be prepared for cross-examination. To this end, the lawyer will assume the role of the adversary lawyer.

Example: I'm going to play the role of an adversary lawyer and I'm going to ask you questions just the way the other lawyer would.

At this point, the lawyer would cross-examine with a view toward getting the client to see the unbelievable aspects of his/her story.

3. Silence — this is just follow up procedure of one and two. This is done by voice inflection and facial expression which suggest disbelief and call for an explanation. Direct eye to eye contact is most important in executing this technique and also nonverbal expressions of disbelief. The lawyer does nothing but wait in silence. If the explanations which are made are unsatisfactory, the lawyer simply shakes his/her head to indicate disbelief and then waits.

4 Direct confrontation — this involves articulating clues which have raised the suspicion of fabrication and telling the client his/her story is not believable.

Example: Mr. Salvador, you say you were in church at 9:00 o'clock in the evening of Saturday at Sto. Domingo church, I find that hard to believe. Sto. Domingo church is closed as early as eight o'clock at night on Fridays.

In many cases, direct confrontation is ineffective, the reason being that the lawyer will remain suspicious while the client sticks with his/her story.

In any event, if the lawyer believes there is conscious fabrication, there are only TWO THINGS which the lawyer must do. Either to CONTINUE or WITHDRAW from the case.

II THE CLIENT WHO SAYS TOO MUCH. (DIGRESSING)

A person who is verbose is usually unwilling to stay with the designated topic — one who RAMBLES or DIGRESSES. For most lawyers, this is the most difficult of all clients. This is so because too much talking will make you very edgy and restless.

Whenever you have a very talkative client, mentally check out your own behavior. Are you being sufficiently attentive or are you being talked at to gain your attention.

THREE APPROACHES:

You can handle digression in the following ways:

1. To empathize with whatever concern the client raises in the rambling response and then return to inquiring about the designated topic.

   Example: Lawyer: I can see that this must be a real concern for you. We can return to this later but for the moment I would like to continue exploring with you the main issues.

   If you have tried that approach without success, you may have to be direct:

   Example: Lawyer: Excuse me, can I stop you there for a moment? I would like to go back to where we were discussing.

   To reinforce your words, consider altering your body posture. You can say .. Can I stop you .... raise one hand with the palm vertical, as if you were physically trying to stop the flow of words. Alternatively, if you have been using open-handed gestures, place your palms down on the table and lean forward as you speak. These body gestures reinforce the impression of taking control.

2. (Adopted only if the first approach fails) — to employ motivational statement which explicitly points out that the lawyer is asking about one subject and the client is replying about another.

3. Break eye contact — this is to discourage the client from talking too much. This is so because it suggests that you are not listening. Rather than gaze completely, it is more polite to gaze out of the window or down at your desk. You can even excuse yourself to go to the comfort room and stay there for several minutes just to break the flow of an aimless conversation. Lastly, it is advisable not to use open ended questions. Use CLOSED ENDED QUESTIONS.

IV. TOO LITTLE TALKING

There are many reasons why a client may be uncommunicative like for instance, a topic is difficult or embarrassing. He may give minimal responses to a topic which is very delicate without realizing it.

If your client has been uncommunicative from the start, ask yourself whether you allowed sufficient time to establish rapport and to ask yourself whether you phrased your questions in a language which the client understands.

Techniques/How to handle:

1. Use open questions.
2. Explain the purpose of the question to the client, if the client thinks you are asking something which is none of your business.

   Example: I've asked you about your family because I need to know what kind of financial support you will have if you leave your husband. You've said that you don't have much money of your own and you work part-time, so we need to find ways of helping you to cope financially. Will your family be able to help you out with money till we sort out the maintenance?

3. Indirectly try to find out what is wrong.

   Example: Mr. Cruz, I had thought things were going quite well. But I've noticed in the last few minutes that you have been rather quiet. Is there anything that is bothering you?

4. If the client started cooperatively in the beginning but not in the later stage of the interview because the subject matter is painful, use a series of closed (narrow) questions because this is easier to answer.

   EXAMPLE: Helen, we were talking about when the police asked you to go with him to the precint. (pause) Did he put his hand on you — on your arm or your shoulder. (pause) Did he grab you or treat you in a rough way? (pause) Did he say anything to you? (pause).

V. DEALING WITH CONFLICT AND AGRESSION

Some clients behave in an agressive and overbearing manner. This behaviour may arise out of feelings of insecurity or anger at being in a particular situation or when they feel they have been severely wronged.

FORMS:

1. Sarcastic or trying to belittle your efforts
2. Being dismissive of your questions or suggestions or showing impatience
3. Domineering client — he appears larger and more powerful than you

How to handle this:

1. Stay calm.
2. Check your non-verbal communication to ensure that you are not sending mixed messages.
3. Speak with confidence.
4. Keep your tone of voice even and low and speak slowly.
5. Do not allow yourself to respond to personal attacks or verbal abuse.

Example:

Client: But I want to sue him to teach him a lesson. What the hell is the legal system for, what use are lawyers, if I can't assert my rights?

Lawyer: I can see that you would want to respond.

NOT: "You may want to use the law for revenge purposes but it is a waste of my time and yours."

V. DEALING WITH HIGHLY DISTRESSED CLIENTS

Most clients arrive in your law office in a very distressed state. For example, when recounting traumatic events. Sometimes, you will be faced with a client who breaks down in your office. You may feel embarrassed about it than the client.

Do not deny the feeling of the client. If he/she wants to cry, allow him or her. Empathize with the stress and show that you are prepared to allow time to recover.

Example: Susan, I'm really sorry we have to go over this. I can understand how upsetting it must be. Take your time. When you are ready, we'll talk about it some more. In the meantime, would you like some tea or coffee?

You can also suggest that the client tries to write down a few facts later, during the next meeting. If it is an important and painful topic, the client may find it easier to think and write it down in private at home, where there is less pressure.

VI. CLIENT IS NOT LISTENING

This situation often occurs when the lawyer is relatively inexperienced or he has just passed the bar exams. More often than not, the client might ignore your advise due to apparent lack of experience and his demeanor suggests lack of confidence in himself because he is a junior lawyer.

In some other situations, the client is not listening because the lawyer's advise conflicts with what the client wants to do in a particular course of action or is not happy with your advise. It is accepted though that the client's decision must always prevail but it is still the lawyer's responsibility to make sure that his suggestions and other legal options are considered.

On the part of the lawyer, once he encounters this problem, he must examine his behavior. He must also check his demeanor because if he shows lack of confidence in himself, the client might not be impressed with what the lawyer will advise.

HOW TO REDUCE TENSION IN AN INTERVIEW

Given the above difficult situations during an interview, you can use nonverbal communication to reduce tension. This technique is known as "MIRRORING." This means you SUBCONSCIOUSLY COPY or mirror each other's gestures.

By consciously following that process of mirroring gestures, you can gradually lead your client into a more relaxed body posture. This is used to put people at ease.

There are THREE PACES of this technique:

1. Mirror
2. Pace
3. Lead

MIRROR — While you are talking to your client, copy or mirror the gestures. Do not caricature them but present a softened version of the way that person is sitting, what they are doing with their arms and legs and so on. What you are aiming to do is to present a subtle reflection of that body posture.

This should not be overdone especially when your client is a gay. You may end up a gay yourself after the interview.

PACE — this takes place when you tune in to the rate of breathing and eye blinking. When your client changes position, gradually alter your position and simulate the client's position.

LEAD — once you have successfully paced your movements, your client will subconsciously follow you. Lead by

gradually changing your body posture. Adopt an open posture, arms are crossed, palms turned upwards, shoulders back but not braced, good but not threatening eye contact, head perhaps tilted on one side, etc. (p. 77, Effective Interviewing, Helena Twist, 1992)

This is useful for influencing technique for meetings or negotiations as well as interviews.

If the person brings negative signals or is resistant and reluctant to your ideas, try this technique — mirror — pace then lead in order to influence that client. Use non-verbal communication skills to reinforce your verbal skills.

Chapter IX

WITNESS INTERVIEWING

We will devote a little time for witness interviewing in view of the role it plays in a case, if there is a need for the presentation of a witness in court. It must be noted that there is a major motivational difference betwen the client and the witness as interviewing subjects. Clients are determined to see a lawyer to solve their legal problems while witnesses will have no conscious decision to see a lawyer and be interviewed with the same passion as the client. Witnesses may even disregard the event and even try to evade the receipt of a court subpoena. It is obvious therefore that while clients want to be involved in cases, witnesses normally shun them. Be that as it may, it is of judicial notice that "the initial reluctance of witnesses to volunteer information about a criminal case and their unwillingness to be involved in criminal investigations is common, and has been judicially declared not to affect credibility." (People vs. Villamin, 62 Phil. 501 cited in People vs. Delfin, 2 SCRA 911). However, if the testimony of the witness is indispensable to help your client, you have no choice but to interview the witness.

Sections 18 to 36, Rule 130 of the Revised Rules of Court must first be considered regarding the rule on who and what are the qualifications of witnesses. You have to understand too that there are many kinds of witnesses. Thus, we have the eyewitness, (People vs. Espinosa, G.R. No. 62613, January 17, 1986), the biased witness (People vs. Watin, 67 O.G. 5901), the credible witness (Molo-Peckson vs. Tanchuco, 100 Phil. 350), and the expert witness (People vs. Santos, 65 O.G. 7472). Of course, you must also have a working knowledge of the two-witness rule in criminal law (See People vs. Agpangan, 79 Phil. 340) and the

witness who is a beneficiary of the Witness Protection Program of the government. (See R.A. 6981)

At any rate, regardless of what kind of witness you are going to interview, the lawyer must develop an overall plan for pre-trial discovery (See 1988 Amendments of the Law on Criminal Procedure) such as (1) what facts are needed from the witness (2) what sources can most likely provide the needed facts (3) what facts should be developed by informal investigation and (4) what facts should be obtained by formal pre-trial discovery. The reasons for these are (1) to emphasize that usually, witness interviews are conducted most effectively after the lawyer has consciously thought through what facts should be discovered and (2) because we must examine one aspect of the pre-trial planning process if our discussion of the purposes and execution of witness interviewing is to be meaningful. This aspect involves the process of deciding what facts should be gathered (p. 124, Legal Counselling and Interviewing, A Client Centered Approach, Binder and Price, 1977 Ed.).

FOUR ULTIMATE FACT SETS NEEDED

In interviewing witnesses, the lawyer must gather four necessary ultimate facts, namely:

1. Facts establishing the existence or non-existence of the substantive elements entitling the plaintiff to relief.
2. Facts corroborating the client's version of the case.
3. Facts constituting the adversary's version of the case; and
4. Facts contradicting the adversary's version of the case.

HOW TO MOTIVATE WITNESSES:

1. Develop rapport. It means that you have to create a harmonious relationship with the witness. Befriend him if necessary.

2. Use facilitators such as "substitute rewards" and "altruistic appeals." The term "substitute rewards" are external gains and therefore, can be seen as indirect substitute rewards. For example, you must tell the witness that he will be able to save time and energy if he will cooperate, anyway, in the future, he will be subpoenaed by the court. On the other hand, the term "altruistic appeals" are principles of conduct where the person is motivated by unselfishness to do a civic duty. For example, you can tell the witness that by cooperating, "you are performing a civic duty because you are helping our judicial system function properly." You may also cite to the person that "a witness who keeps silent renders his credibility doubtful." (People vs. Madarang, 31 SCRA 148, People vs. Delavin, 148 SCRA 257, People vs. Besa, 183 SCRA 533)
3. Remember that witnesses are governed by the same sets of facilitators and inhibitors as your clients.

In questioning witnesses, you must employ the same technique as in client interviewing. If you are interviewing an expert witness though, you must be able to have a working knowledge of the particular field or expertise that he is going to testify on. In all other kinds of witness, let the witness relate the incident in his/her own, simple words and lastly, try to observe the non-verbal clues and body language.

SPECIAL INTERVIEWING CASES:

A. The mentally disturbed.

In interviewing mentally disturbed persons, you must first be guided by the following jurisprudence:

INSANITY

1. "Blockhead" means "a person deficient in understanding" and "mental pachyderm" refers to a distorted mind, a mind that is insensible, unfeeling,

senseless, hardened, callous." (People vs. Aquino, 18 SCRA 555)

2. Courts should be careful to distinguish insanity in law from passion or eccentricity, mental weakness, or mere depression resulting from physical ailment. The State should guard against sane murderers escaping punishment through a general plea of insanity. (People vs. Bonoan, 64 Phil. 87)

3. An imbecile is a person marked by mental deficiency while an insane person is one who has unsound mind or suffers from a mental disorder. An insane person may have lucid intervals but "el no hay una alteracion, sino una carencia del juicio mismo." (1 Viada, Codigo Penal, 4th Ed., p. 92)

4. Insanity has been defined as "a manifestation in language or conduct of disease or defect of the brain, or a more or less permanently diseased or disordered condition of the mentality, functional or organic, and characterized by perversion, inhibition, or disordered function of the sensory or of the intelective faculties, or by impaired or disordered volition.(Sec. 1039, Revised Administrative Code)

5. When there is no proof that the defendant was not of sound mind at the time he performed the criminal act charged to him, or that he performed it at the time of madness or of mental derangement, or that he was generally considered to be insane — his habitual condition being, on the contrary, healthy — the legal presumption is that he acted in his ordinary state of mind and the burden is upon the defendant to overcome this presumption. (U.S. vs. Zamora, 32 Phil. 218)

6. What should be the criterion for insanity or imbecility? We have adopted the rule, based on Spanish jurisprudence, that in order that a person could be regarded as an imbecile within the meaning of article 12 of the Revised Penal Code, he must be deprived completely of reason or discernment and freedom of

the will at the time of committing the crime (People vs. Formigones, 87 Phil. 658,660). In order that insanity may be taken as an exempting circumstance, there must be complete deprivation of intelligence in the commission of the act or that the accused acted without the least discernment. Mere abnormality of his mental faculties does not exclude imputability. (People vs. Cruz, 109 Phil. 288, 292, People vs. Renegado, 57 SCRA 275, 286)

7. The latest rule on this point (insanity) is that "the so-called right-wrong test, supplemented by the irresistible impulse test, does not alone supply adequate criteria for determining criminal responsibility of a person of alleged mental incapacity." An accused is not criminally responsible if his unlawful act is the product of a mental disease or a mental defect. A mental disease relieving an accused of criminal responsibility for his unlawful act is a condition considered capable of improvement or deterioration; a mental defect having such effect on criminal responsibility is a condition not considered capable of improvement or deterioration, and either congenital, or the result of injury or of a physical or mental disease. (Syllabi, Durham v. U.S. 214 F. 2d 862, 874, 45 A.L.R. 2d 1430 [1954] cited in People vs. Ambal, 100 SCRA 325)

8. Mental deficiency affects the weight accorded testimony, not its admissibility. Accordingly, an adjudication of feebleminded does not render a witness incompetent not does having spent time in a mental institution as long as their mental condition or mental maturity are not impaired at the time of their production for the examination (Sec. 21 [a and b], Rule 130). The ultimate question to be asked is whether the witness is so bereft of his power of observation, recording, recollection, or narration as to be so thoroughly untrustworthy as a witness as to make his testimony lack relevancy. Thus, upon viewing all the evidence of personal knowledge in a light most favorably to the

proponent of the witness alleged to be mentally deficient, if a trial court judge in viewing his manifest deficiencies could not believe that the witness in fact observed, recorded, recollects, can narrate, and understands the duty to tell the truth, the witness' testimony may not be introduced. (Graham on Evidence, 1986 ed., cited in p. 246, Paras, Rules of Court Annotated, Vol. 4, 1991 Ed)

9. Under foreign jurisdiction, there are three major criteria in determining the existence of insanity: delusion test, irresistible impulse test, and the right and wrong test. (People vs. Dungo, 199 SCRA 860)

10. In plea of insanity, the two distinguishable tests must be established, to wit: (a) the test of cognition — complete deprivation of intelligence in committing the criminal act and (b) the test of folition — or that there be a total deprivation of freedom of the will. (People vs. Rafanan, Jr. 204 SCRA 65)

11. Statement in a certification issued by the corporation's administrative officer that an employee is "mentally unfit to work" should be read and construed as a whole, and based on the professional findings in the doctor's psychiatry report. (Guita vs. Court of Appeals, 139 SCRA 576)

12. Proof of insanity must relate to the time before or coetaneous with the commission of the crime. (People vs. Aldemita, 145 SCRA 451)

13. When a defendant in a criminal case interposes the defense of mental incapacity, the burden of establishing such fact rests upon him. (People vs. Fausto, 3 SCRA 863)

In dealing with the mentally disturbed, it is important to distinguish between those who are "mentally handicapped" — those born with congenital defect and those who are "mentally ill," and may, with treatment, be helped to recover. As a matter of fact, a rape victim who had to be confined in a mental asylum due to shock is not disqualified, nor does it affect her ability to testify. She is also a credible witness (People vs. Tolentino, G.R. No. 40236, December 14, 1985).

Mental illness can be further divided into those suffering from "neurosis" and those suffering from "psychosis." Neurosis appears to cover the condition where people are so nervous or so worried that they are not able to deal with life or a particular problem. Psychosis on the other hand, is when one is mentally "unbalanced" and will therefore be suffering from delusions of grandeur or be paranoid.

If your are faced with any of these two kinds of clients, it is good to refer them to psychiatrists or psychologists in order to help them recover from the ill effects of a particular problem or injury. Under our laws, there is a special proceeding for the hospitalization of insane persons, specifically Rule 101 of the Revised Rules of Court. It provides as follows:

Sec. 1. Venue. Petition for Commitment. — A petition for the commitment of a person to a hospital or other place for the insane may be filed with the Regional Trial Court of the province where the person alleged to be insane is found. The petition shall be filed by the Director of Health in all cases where, or for the welfare of said person who, in his judgment, is insane, and such person or the one having charge of him is opposed to his being taken to a hospital or other place for the insane.

B. People with suicidal tendencies.

Sometimes, you are faced with a client who is overburdened with problems and would instead want to destroy his own life. This refers to suicide. Of course, you must be reminded of Article 253 of the Revised Penal Code on the law regarding giving assistance to suicide. Other than the liability of a person who gives assistance to suicide, you must know that suicide is not a normal part of adolescence and should be taken very seriously. It must be clearly understood that the attempt at suicide may be a cry for help, a desperate plea for someone to listen. If the lawyer

sees that the client may be having suicidal thoughts, it is wise to be very direct and ask the client whether this is the case. He will generally respond very honestly. The important questions to pursue are: (1) Does the client have any plan? (2) Is the plan workable? and (3) Has the client ever attempted to commit suicide before? It may be worthwhile to know the classes of suicide for you to gauge and categorize where your client falls if he will ever insinuate that he would like to commit suicide. They are as follows: (1) Altruistic suicide — where a person takes his life with the idea that by doing so, he will benefit others. The individual in such societies thinks primarily of the group welfare. For example, among the Eskimos and the Chuckchee, old people who can no longer hunt or work kill themselves so that they will not consume food needed by other adults in the community. Some suicide occurs in warfare when persons kill themselves to avoid capture and slavery or because of the disgrace of their failure as warriors. The popular examples of this type were the legendary kamikaze pilots of Japan during the Second World War. (2) Egoistic (egocentric) suicide — where the suicide lacks a support grouping. This kind is associated with those having personal problems like financial difficulties. (3) Anomic suicide — this occurs when the individual feels "lost" or "normless" in the face of situations where the values of a society or group are confused or break down. This usually occurs in people who experience a sudden crisis in their lives especially if the equilibrium of society has been severely disturbed. This happened during the 1929 depression in the United States of America or to refugees of certain countries. (pp. 515-517, Sociology of Deviant Behavior, Marshall B. Clinard, 1963 Ed.) Likewise, in recent years, it has been observed that there are two major groups of people with suicidal tendencies: (1) those who attempt suicide to gain attention and (2) those who fully intend to take their own lives.

At any rate, if you are faced with these kinds of clients and they will not listen to your legal advices, you must refer them to other professionals like psychologists who understand them better.

C. Children

Under our laws, children are those who belong to the 18 year old and below bracket. (P.D. 603) Innate in our culture and belief is the fact that a young child does not know how to tell a lie. On the other hand, most of the time, he will tell the truth.

At any rate, we cannot easily say that children have the same cognitive ability as between a 15 year old boy to that of a seven year old. A lawyer cannot be expected to know and determine which stage of ability a child is in. However, it is important to know that the cognitive skills of a child can vary depending on the social, emotional, physical, and perceptual environment of that child. For this reason, it is always advisable to talk to the parents or guardians of the child for some background information regarding his cognitive skills, traits and other idiosyncracies if it is inevitable that you have to conduct a legal interview with the child.

It is well accepted too that children are much more open to suggestion than adults. However, in view of their age, they may not be able to recognize facts from fantasies and it would be difficult for them to know realities from their dreams. It is therefore important to know that before and after you interview a child, you must double check any information gathered from him and to make more questions if what he told you is different from what you obtained elsewhere. This may be true, especially now that there are a lot of child abuse cases.

Another thing. In interviewing children, we must not ask questions which lead or suggest them to answers. Rather, they must be interviewed in such a way that they themselves give the answers to the questions. If possible too, children must be interviewed in the comfort of their homes or in a familiar surrounding in order to gain their confidence and to make them more at ease. When children feel understood, respected, and secure, they share their thoughts and feelings in an open manner. When this condition have not been met, do not interview the child because chances are, you will only get superficial answers.

(Cf. pp. 117-125, Client Interviewing for Lawyers, Avrom Sherr, 1986 Ed.) Of course, it goes without saying that you must use simple terms and the dialect or language known to the child to facilitate understanding. At times, you may be excused to use vulgar words just to get the real meaning of what the child is trying to say simply because a word may have several synonyms yet the other meaning is not known to the child.

Lastly, the Supreme Court had always respected the testimony of children provided they are not tainted with serious inconsistencies. Thus, "the rule is well settled that unless a child's testimony is punctured with serious inconsistencies as to lead one to believe that he was coached, if he can perceive and make known his perception, he is considered a competent witness." (People vs. Cidro, 105 Phil. 238, U.S. vs. Ambrosio, 17 Phil. 295, U.S. vs. Buncad, 25 Phil. 530, U.S. vs. Tan Teng, 23 Phil. 145, People vs. Sasota, 52 Phil. 281, People vs. Tumayao, 56 Phil. 587). Likewise, the Supreme Court also recognized and accepted the testimony of a two (2) year old girl (People vs. Macalino, 209 SCRA 788), a five year old girl (People vs. Jones, 137 SCRA 166), understood the testimony of a six year old, despite failure to give a detailed account of how she was abused (People vs. Yambao, 206 SCRA 392) and allowed the testimony of an eight year old girl (People vs. Cabodac, 208 SCRA 787), a nine year old girl (People vs. Jones, 137 SCRA 166, People vs. Santos, 183 SCRA 25), a ten year old boy (People vs. Traya, 147 SCRA 381), a 12 or 13 year old girl (People vs. Hermosada, 143 SCRA 484), and even an unlettered 15 year old girl (People vs. Lor, 132 SCRA 41) and that the testimony of children of sound mind is likely to be more correct and truthful than that of older persons (Collado vs. Intermediate Appellate Court, 206 SCRA 206, People vs. Mesias, 199 SCRA 20). It is still submitted though that before a child is presented in court as a witness or as a party complainant, he must still hurdle the rigors of a legal interview.

D. Interviewing Older Adults

Older adults are those who belong to the 75 and above

age group. Interviewing them could present minor problems in view of their being inherently different since they belong to the older generation. Perhaps it is educational to know that "aging is accompanied by certain physiological changes." There is generally cellular atrophy and degeneration as well as the more readily observable aspects of graying hair, baldness, wrinkling of the skin, stiffness and changes in bodily form. The changes due to age are as follows:

1. Gradual tissue desiccation.
2. Gradual retardation of cell division, capacity of cell growth and tissue repair. This involves also a decline in capacity to produce the products of secretion, whether they be known substances such as pepsin or thyroxine or the less well identified antibodies involved in immunity.
3. Gradual retardation of the rate of tissue oxidation (lowering of the speed of living or metabolic rate).
4. Cellular atrophy, degeneration, increased cell pigmentation and fatty infiltration.
5. Gradual decrease in tissue elasticity and degenarative changes in the elastic connective tissues of the body.
6. Decreased speed, strength, and endurance of skeletal neuromuscular reactions.
7. Progressive degeneration and atrophy of the nervous system, impairment of vision, of hearing, of attention, of memory, and of mental endurance.
8. Gradual impairment of the mechanisms which maintain a fairly constant internal environment for the cells and tissues (a process known as homeostasis). It is evident that the sufficient weakening of any one of the numerous links in the complex processes of homeostasis produces deterioration." (Anton J. Carlson and Edward J. Stieglitz, "Physiological Changes in Aging," The Annals, 279:22 [1952])

You often encounter interviewing older adults especially in the preparation of Last Will and Testament and naturally, you have to interview them before preparing the same. Even the Supreme Court had occasion to rule that older adults who live past beyond eighty still have the mental capacity to prepare a last will and testament (See Torres and Lopez de Bueno vs. Lopez, 48 Phil. 772). Of course, you will expect different kinds of tantrums from them, but be patient enough to listen to them, just the same.

If you happen to interview the older adults either as clients or witnesses, you must remember the following suggested guidelines:

1. Listen intently. The client may have a low or inaudible voice or even partially deaf.
2. Ask simple, straightforward questions. Never shoot a barrage of questions which the client may not understand or comprehend.
3. Be in control of the interview. Never feel cowed by the older person's age and authority.
4. Do not underestimate your ability to understand. The age and vast experiences and even the personal conquests and deeds of the client should not be a source of hesitancy or inferiority nor feel overwhelmed to interview him.
5. Listen to the older person's view of the situation. Even if he is of advance age or even debilitated, and is therefore dependent on some other people, you must still listen to his views and opinions. His decisions and feelings must be treated just like any other client.

Chapter X

LEGAL COUNSELLING

BASIS OF LEGAL COUNSELLING:

1. Constitution

   (1) Art. III, Sec 12. (1) — Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.

   (2) Art. III, Sec. 14 (2) — In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel xxx

2. Revised Rules of Court —

   (1) Rule 7 — Section 5 — Signature and address of attorney — The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief, there is good ground to support it; and that it is not interposed for delay. For a willful violation of this rule, an attorney may be subjected to appropriate disciplinary action.

   (2) Rule 112, Sec. 11 — At any time during the proceedings referred to in the preceding section, the defendant, if he so requests, shall be allowed to have the services of an attorney. For this purpose, the judge or corresponding officer may require any peace officer to

deliver any message from the defendant to any attorney requesting the latter's services.

(3) Rule 112, Sec. 16 — During preliminary investigation, the accused shall have the right to be represented by counsel xxxxx

(4) RULE 113, Sec. 18 — Right of attorney to visit the person arrested — He shall have the right to visit and confer with the client in jail or any place of custody at any hour of the day or in urgent cases, of the night.

(5) RULE 115 — Rights of the defendant — Sec. 1 (a) The right to have an attorney at every stage of the proceedings — from arraignment to promulgation of judgment.

(6) RULE 116, Sections 3, 4, and 5 — Arraignment — He must be informed of his right to an attorney before arraignment and if none — counsel *de oficio* must be appointed — and he must have an opportunity for time to prepare for trial.

(7) RULE 124, Sec. 2 — Appointment of attorney *de oficio* for the defendant. — If it appears from the certificate of the clerk of the trial court transmitted in accordance with section 13 of Rule 122 (a) that the defendant is confined in prison (b) without means to employ an attorney, and (c) desires to be defended *de oficio*, then the clerk of the Court of Appeals will designate a member of the bar to defend him, such designation to be made by strict rotation, unless otherwise directed by order of the court.

A defendant-appellant not confined in prison, shall not be entitled to an attorney *de oficio,* unless the appointment of such attorney be requested in the appellate court within ten (10) days from receipt of notice from the clerk as provided in the next section, and the right thereto established by affidavit of poverty.

(8) RULE 138, Section 20 — Duties of attorneys. — It is the duty of an attorney:

xxx xxx xxx

(c) To counsel or maintain such actions or proceedings only as appear to him to be just, and such defenses only as he believes to be honestly debatable under the law.

xxx xxx xxx

(9) Code of Professional Responsibility promulgated by the Supreme Court on June 21, 1988

LEGAL COUNSELLING — is working with a person who has a problem in which potential solution, with their probably positive and negative consequences, are identified and then weighed in order to decide which alternative is most appropriate.

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PRELIMINARY MATTERS:

Before giving counsel to a client, the following law and jurisprudence must be borne in mind:

1. It is the lawyer's duty as a member of the Bar "to abstain from all offensive personality and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of cause with which he is charged." (Surigao Mineral Reservation Board vs. Cloribel, 31 SCRA 1)

2. Attorneys must continue to adhere to the standards of mental and moral fitness set up for the practise of law. (In re: Gutierrez, 5 SCRA 661)

3. When the lawyer's integrity is challenged by evidence, it is not enough that he denies the charges against him; he must meet the issue and overcome the evidence for the relator and show proofs that he still maintains the highest degree of morality and integrity, which at all times is expected of him. (Quingwa vs. Puno, 19 SCRA 439)

4. An attorney owes loyalty to his client not only in the case in which he has represented him but also after the relation of attorney and client has terminated and it is not good

practise to permit him afterwards to defend in another case other person against his former client under the pretext that the case is distinct from and independent of the former case. (Nombrado vs. Hernandez, 26 SCRA 13)

5. A lawyer is guilty of carelessness or negligence for presenting evidence containing false statement even though he had no knowledge that it contained such false statements. (Berenguer vs. Carranza, 26 SCRA 673)

6. It is the bounden duty of a lawyer to inform his client whether his case is meritorious or not. (Cobb-Perez vs. Lantin, 24 SCRA 291)

7. An active participation of a lawyer on one's party's affairs in a case in which he is also the counsel of the oppposing party is brazenly unethical and should be condemned. (Zubiri vs. Zubiri, 18 SCRA 1157)

8. A lawyer is prohibited to purchase property in litigation from his client. (Rubias vs. Batiller, 51 SCRA 120, Fornilda vs. Branch 164 Regional Trial Court IVth Judicial Region, Pasig, 166 SCRA 281, Ordonio vs. Eduarte, 207 SCRA 229)

9. Failure of counsel to live up to exacting standard of candor and honesty in preparation of pleadings may be punished (Munoz vs. People, 53 SCRA 190, reiterated in Cuaresma vs. Daquis, 63 SCRA 257) and that lawyers should exercise care and circumspection in the preparation of their pleadings and refrain from using abrasive and offensive language (Yangson vs. Salandanan, 68 SCRA 42, Andres vs. Cabrera, 127 SCRA 802). A lawyer has the right to ask that disciplinary action be taken against a judge, but he should use decorous and judicious language. (Garcia vs. Alconcel, 111 SCRA 178)

10. A legal counsel is expected to defend a client's cause but not at the expense of truth and defiance of laws. (Cosmos Foundry Shop Workers Union vs. Lo Bu, 63 SCRA 313)

11. It is the duty of the counsel to receive notices addressed to the client and see to it that his client is informed of said notice. (Taroma vs. Sayo, 67 SCRA 508)

12. A lawyer who advices that the spouses can live separately from bed and board through a document is contrary to law, morals and public policy. (Tabiliran vs. Tabiliran, Jr., 115 SCRA 451)

13. Assisting a client in a scheme a lawyer knows to be dishonest justifies disbarment of an attorney. (Uy Chung Seng vs. Magat, 119 SCRA 111)

20. Lawyers are admonished not to commence litigations that for sheer lack of merit do not deserve the attention of the courts but merely clutter the already congested judicial dockets. (Bagonon vs. Zerna, 154 SCRA 593)

21. Attorneys are bound to advice their clients not to make untenable claims. (Periquet vs. National labor Relations Commission, 186 SCRA 724)

22. Negligence of counsel is binding on the client just as the latter is bound by the mistakes of his lawyer. (MERALCO vs. Court of Appeals, 187 SCRA 200, Lincoln Gerard, Inc. vs. NLRC, 187 SCRA 701, Reyes vs. Court of Appeals, 189 SCRA 46, Paramount Vinyl Products Corp vs. NLRC, 190 SCRA 525, Tupas vs. Court of Appeals, 193 SCRA 597, Alabanzas vs. Intermediate Appellate Court, 204 SCRA 304, B.R. Sebastian Enterprises, Inc. vs. Court of Appeals, 206 SCRA 28)

23. A lawyer should present every remedy or defense authorized by law in support of his client's cause, regardless of his own personal views. (Legarda vs. Court of Appeals, 195 SCRA 418)

24. Any lawyer who assumes the responsibility for a client's cause has the duty to know the entire history of the case, specially if any litigation has commenced. (Dimagiba vs. Montalvo, Jr., 202 SCRA 641)

25. A lawyer must serve his client with competence and diligence and failure to do so violates Canon 18 of the Code of Professional Responsibility. (Legarda vs. Court of Appeals, 209 SCRA 722)

26. A man of the law should never use his legal expertise and influence in order to frighten or coerce anyone especially

the ordinary man who looks up to him for justice. (Roque vs. Clemencio, 212 SCRA 618)

Stereotypes and role descriptions of a legal counsellor:

The lawyer may be looked up to in any of the following stereotypes. Whether you want to categorize in any of them, do your best as a legal counsellor when your services are engaged.

1. Gladiator or a hired gun — the classic lawyer role — because he fights in behalf of the wishes of a client regardless of right or wrong in the dispute.
2. High priest — another description — this is so because he hands down seemingly unalterable advise. He gives advise as if it has been received from an unseen diety. The client must accept this advice, sorrounded as it is in the mystique of the law without question.
3. Business person — who happens to trade in the market of legal services. He practises out of pieces of paper.
4. Professional — some other persons see him as a professional like a doctor — one who is interested in helping a client in the same way that a doctor cures a patient.

THE NATURE OF COUNSELLING

There are several thoughts and ideas about counselling. Some people think that it is a form of magic — a procees that offers quick solution to a legal problem. If a person goes to a legal counsellor, it is expected that the latter will offer solutions and the problem will vanish right away. Others say that counselling is purely advise giving. Often, people go to the counsellor and ask what possible course of action must be done, with the hope of getting an instant answer to the problem — akin to that of a physician who prescribes the appropriate medicine after a brief diagnosis of an ailment. This form may be manifested with words such as "If I were you ..." or "I think that you should .." or "You probably need to ..." and the like. The trouble is, the "pointing out" method does not take into account the feelings of the client, scale of values, prejudices, their aims or ideals in life.

This must not be done in real life.

Legal counselling, in practise, is usually a series of conferences and meetings to help the client gain insight into his own legal problem through a proper understanding of the factual circumstances surrounding the case. It is a technique as well as an art that deals with the life of people. If a person comes for legal counselling, it means he is confused and weak and he needs enlightenment and guidance to strengthen his ego.

KINDS OF LEGAL COUNSELLING

1. Directive counselling — In this kind of counselling, the counsellor has control of the process and its outcome. He is aggressive and he directs the process. He leads the interview, discovers, diagnoses, and treats the client's problem. The counsellor practically puts into his mouth what the counselee is to say. The only responsibility of the counselee is to cooperate.

   Example: Lawyer: Good God, I am glad you returned. I have been expecting you to come since we last talked about your case. I know I can help you.

   Client: I cannot really understand my brother. After our father died, he wants to have all our properties and just wants me to get a pittance. That is not fair.

   Lawyer: Your brother might be right. You are richer than he is because he is not employed and is younger than you are. Have you talked to him about it?

   Client: Not lately. It is not easy to talk to him. He easily flares up and would not listen to me.

   Lawyer: Do you want me to talk to him? Maybe I should. If he insists on what he wants, maybe just keep quiet to avoid a family squabble, anyway you are better off than him.

2. Non-directive counselling — a process where the counsellor leads the person to have insight into his own problem and the counsellee does his own thinking. He is free from any type of coercion or pressure. He is given much time for a conscious choice.

Example: Lawyer: Please come in and be seated.

Client: Thank you. You must have heard about my problem with your *kumpadre*. He has not been home for about two weeks now. (She cries)

Lawyer: Mmhm . . . Will you please tell me more about it, *kumadre*?

Client: We had a quarrel when he left. Before that, he would come home very tired and drunk and smelled the scent of a woman. You know I am a member of a religious organization and I cannot tolerate his womanizing.

Lawyer: Did you say that he drank?

Client: Well, yes, he did. I noticed this shortly before we quarreled. He did not talk much during those days, but . . .

Lawyer: So he did not talk much for a few days before he left.

Client: Oh, he used to complain about my neglecting the children; my heavy shopping at Shoemart and he suspects that I run around with another man.

Lawyer: Mm-hm... And he thinks that you run around with another man?

3. Semi-directive counselling — this is a combination of the directive and non-directive forms of counselling. The counsellor leads the counselee to his own thinking so that he will gain insight into his own problem. The cooperation between the two is on a fifty-fifty basis.

APPROACHES TO LEGAL COUNSELLING:

1. FORMAL COUNSELLING — this is highly technical in nature where the lawyer needs some degree of skill and preparation just like those items presented in Chapter I of this Book where an interview room is prepared with an atmosphere that is conducive to having a dialogue.
2. INFORMAL COUNSELLING — the procedure need not be pre-arranged. It may take place anywhere — in the office, in the factory, in the street, in church or even in a crowd.

THE FORM OF ADVICE:

Giving of advice in the legal context involves the giving of a general statement of the law relating to the "legally relevant" facts, applying that general picture to the background and circumstances of the client's case and discussing with the client which of the possible alternatives resulting from this application would be most desirable.

A. General statement of relevant law

This involves matching the given factual situation against paradigm fact situation remembered or researched from existing reported cases. You are just like thinking like a lawyer. It is the application of the fundamental area of the law.

B. Applying the law and jurisprudence directly to the client's case.

After interviewing your client, you must study the applicable law and jurisprudence that jibes with the facts of the problem and thereupon convey to the client if his legal expectations of the case will be tenable. Be careful too to pick out jurisprudence, whether foreign or local, as to whether the facts presented therein will fall square to your case. Avoid citing jurisprudence that presents different factual application from that of your client, and if there is

no jurisprudence on the matter, then just harp on the applicable law.

C. Present other alternatives to the client

After the interview, you must be able to present all the "angles" of the case to your client. This means that you must be able to present alternatives to the client if there are several possible choices for a particular course of action. That way, the client can make an intelligent choice. If he does, you must be able to defend that legal position in court. Of course, this does not preclude the lawyer from telling the client that an amicable settlement is a wise alternative settlement. This is where preventive lawyering comes in. After all, a lawyer should encourage his client to avoid, end or settle controversies if it will admit of a fair settlement. (De Ysasi III vs. National Labor Relations Commission, 231 SCRA 173)

D. PROBLEMS IN GIVING ADVICE

(a) Use of jargon — technical legal words or expressions which may not be immediately understood. Once you are a member of a group, jargon does not sound like jargon anymore. To the outsider however, it is another language. Overuse of jargon leads to misunderstanding and even fear because they worry about appearing stupid.

Example: Lawyer to a client: *"Hindi ako naglalagaring Hapon."*

A suitable translation could be that the lawyer is honest; that he is sincere to his client alone and will not work for the adversary for a fee.

Likewise, lawyers use legal terminology to maintain the precision of the rules and concepts which they expound. For example, the word *certiorari* or *res ipsa loquitor* may not be understood by the client.

It is advisable therefore on the part of the lawyer to explain the meaning of the legal technical term to the client in vernacular form and define all terms as simple as possible.

(b) Problems for clients in receiving and understanding advice.

Lay people have difficulty in understanding the advice or opinions of professionals. This may be due to several factors especially if that client belongs to a different social class.

Clients may also "freeze" when hearing the lawyer's advice. They may be so anxious that when the advice is given, their anxiety prevents them from hearing.

There is a difference between written information and spoken information.

(c) Rehearsal and the lawyer's part:

The ideas are still in the process of being formulated in the lawyer's mind. So, have a mental outline of what you are going to advice on.

(d) Remembering:

It is not only necessary that the advice is understood. It must be REMEMBERED. This is especially so when you give several alternatives.

REMEDY: After the interview, write the client confirming such advice and stating the plans of action.

(e) Achieving Compliance:

See to it that your clients comply with your advice.

E.G. — get an appraisal company to appraise your property to show the true, fair market value., etc.

COUNSELLING DIFFICULT CLIENTS AND HOW TO HANDLE THEM

1. Clients who are extremely indecisive

A client is indecisive when he is unable to recognize any satisfactory solution to his problem. To him, any suggested solution is just not fully satisfying.

For example, in a family law problem whereby Mr. Cruz wants to annul his marriage. Despite his plan to so annul said marriage and live alone, he has second thoughts because he loves his children very much, but could not on the other hand live with a wife who runs around with different men. If after giving an advice and the client remains indecisive, the lawyer must not hesitate to tell that the final decision is on the client. Lawyers must not be offended therefore if the client will not listen to his advise.

2. A client who insists upon the lawyer's opinion

Sometimes, you meet clients who are unlettered and would heavily depend on your legal expertise on a given case. They would insist on your opinion just to confirm what is best for them. For instance, here is a rich rice trader who was once the "rice kingpin" of a certain province. When the price of rice bogged down, he was unduly affected to the extent that he borrowed money from friends and when he was on the verge of bankruptcy, he was sued by all his creditors. After an interview with him, it appears that most of his real estate properties are mortgaged with the bank and some of his personal properties were levied by the sheriff. In other words, he could not move. His business is totally paralyzed. After making a computation of how his assets could offset his liabilities during the pendency of the case, it was found that a compromise agreement would be better for him and it was suggested that the levied properties must be sold in order to pay the bank and some of his creditors and once the mortgaged properties are redeemed, they will likewise be sold to fully pay his obligations. Such advice seem unwise to him because he would be losing much of his properties. However, it was found out later on that he was afflicted with throat cancer and had little time to decide. It was then that he would insist on the opinion of the lawyer and totally relies his fate on you. As stated, if you make some unacceptable decision for him, and he is not inclined to accept it, again, you must tell him that the final decision is his and his alone. After all, it is the duty of a legal counsel to advise his client on the merit of lack of merit or his case.(Castaneda vs. Ago, 65 SCRA 505) and it is likewise the prerogative of the client to change his counsel anytime if he wishes. (Quilban vs. Robinol, 171 SCRA 768, Rinconada Telephone Co. Inc. vs. Buenviaje, 184 SCRA 701)

3. A client who has already reached a decision

There are clients who also come to your law office and consult you about a case, but he has already "made up his mind." He wants to see you if what is on his mind is legally tenable. Whether that case be a criminal case, a civil case or any other kind of case, perhaps, you must caution your client to make a reconsideration especially if what is on his mind is contrary to law or is not for his own best interest in the long run especially those seeking revenge and would want to use the law to foster said intent. Again, Rule 15.05 of the Code of Professional Responsibility is a good source of advise and perhaps you could show empathy and say something like: "I understand your anger towards him. On the other hand, since you sought my advise, it is my responsibility to tell you that perhaps you may want to reconsider your position. After all, in the long run, your plan might cause you trouble." Lastly, it may be worthwhile to remember that "a lawyer must obey his own conscience and not that of his client." (Erectors, Inc. vs. National Labor Relations Commission, 166 SCRA 728)

4. A client who is fond of appealing hopeless cases

At times, there is a client who is fond of appealing his case to the higher courts despite the futility of said act. This is good for lawyers as long as they get paid, but the same must be discouraged. It may be good to remember the following jurisprudence on the matter:

1. A counsel should temper the inclination of his client to appeal notwithstanding the clear absence of chance for success. (Arangco vs. Baloso, 49 SCRA 296).
2. It is the duty of lawyers, at a certain point of litigation to concede to a decision of the court. (Radio Communications of the Philippines vs. Philippine Communications Electronics and Electricity Workers Federation, 65 SCRA 82)

3. An attorney abuses his right of recourse to the Supreme Court when he files multiple petitions for the same cause in false expectation of getting favorable action from one division as against the adverse action of the other division. (Cabagui vs. Court of Appeals, 67 SCRA 299)

4. It is the duty of a legal counsel to advise his would be clients that their case is weak and could hardly prosper on appeal. (Ballos vs. Balasabas, 75 SCRA 112)

CONSEQUENCES

Rule 15.05 of the Code of Professional Responsiblity provides that "A lawyer when advising his client, shall give a candid and honest opinion on the merits and probable results of the client's case neither overstating nor understating the prospects of the case." In other words, the lawyer is expected to tell the client the legal as well as the non-legal consequences that must be considered when the client eventually makes a decision.

The legal consequences

The term LEGAL CONSEQUENCE refers to the legal status in which the client will be placed should the client follow a particular course of action.

The non-legal consequences

On the other hand, the term NON-LEGAL CONSEQUENCES refers to the economic, social, and psychological results that will arise upon choosing a given course of action.

EXAMPLE: Haide de Luna is a real estate lessor. She was arrested and subsequently charged of violating R.A. 6425, otherwise known as the Dangerous Drugs Act (illegal possession of fifty kilos of marijuana) on trump up charges. She knows she is innocent because she was framed up. In the precint, she was told by the arresting officers to give them P20,000.00 in exchange for her freedom, without any charges. If Ms. de Luna gives the money, there will be no charges against her. However, since she knows she is innocent, she would want to fight it off, but the only thing is that she will stay in prison in the meantime,

while the case will be heard. On the other hand, she can easily have the P20,000.00 in no time at all since she is a lessor anyway. Given this situation, what are the legal and non-legal consequences?

As the foregoing problem illustrates, a decision to litigate or not may carry with it legal and non-legal consequences. In the case at bar, if Ms. Luna will enter into litigation, she will stay in prison up to the time the case is fully heard. She may stay there for years and will therefore be deprived of her liberty. There is also the possibility that if she will be found guilty, she may be sentenced to death. On the other hand, the non-legal consequences are that she will be deprived of earning a livelihood, she will be labelled as a drug pusher by her friends and relatives and she will suffer sleepless nights, anxiety, and endless psychological sufferings.

PREDICTING CONSEQUENCES

Unless you were able to make a thorough study of the case after the interview, never predict any legal consequence to the client. It is normal though for a client to ask you: *"Ano sa tingin niyo ang kaso ko,"* meaning, he wants not only an assessment but a prediction of what will happen: good or bad. If that happens, always remember the applicable law to the case presented. Upon such a law will you alone be able to make a safe prediction of what is going to happen, unless there are complex issues presented. Of course, you must also take into consideration how the Judge will rule on the issues of the case goes into trial, considering that he has much discretion in the trial of a case. Of course if preponderance of evidence is on your side coupled with an alert, cooperative client, it will be easy to predict the outcome of the case.

IS THE LAWYER RESPONSIBLE FOR ERRONEOUS PREDICTION OF LEGAL CONSEQUENCES?

Canon 15 of the Code of Professional Responsibility states that "a lawyer shall observe candor, fairness and loyalty in all his dealings and transactions with his clients."

Looking at this provision, the lawyer is tasked with the observance of "candor" towards his client. Thus, if he makes a

legal prediction, he must do it with all honesty and candor especially because the client has little or no experience at all on how the judicial system works. After becoming a member of the Bar, it is presumed that the lawyer has a superior data base upon which to make a fair prediction of what is going to happen to a client's case. It is submitted therefore that allowing a lawyer with little experience to try a case and with nary an idea of the likely outcome of a case is akin to allowing a doctor who conducts an operation with no idea as to what is going to happen to the patient after the operation.

Given such a situation, the tyro lawyer must consult with senior members of the Bar to get their views and experiences on the matter. Remember, the mistake or negligence of the lawyer binds the client. (See B.R. Sebastian Enterprises, Inc. vs. Court of Appeals, 206 SCRA 28)

Chapter XI

PRACTICAL APPLICATION

Before every end of the semester, my students always enjoy the actual interview portion whereby there is a mock interview in a rape case under the title "Criminal Law Clinic." Sometimes, the actual interview portions vary depending on the assignment, like Family Law, problems on Legal Separation and Annulment of Marriage and even a new topic on Sexual Harassment.

I deemed it proper therefore to have a synopsis of the leading Supreme Court cases on situations calling for the giving of advise after conducting a legal interview. Included herein are jurisprudence in rape, drug related cases, violation of B.P. 22 and some rulings on Family Law and some helpful guides and jurisprudence about attorney's fees.

The author submits that these leading jurisprudence are indispensable before giving counsel to a client.

DRUG-RELATED JURISPRUDENCE

Jurisprudence to remember before handling drug-related cases:

1. It is possible that a person can still be convicted of violating the Dangerous Drugs Law even if his extrajudicial confession is disregarded. (People vs. Nillos, 127 SCRA 207)
2. Possession of considerable quantity of marijuana leaves and seeds coupled with the fact that the accused is not a user of prohibited drugs, indicates an intention to sell, distribute and deliver marijuana. The same is still punishable. (People vs. Toledo, 140 SCRA 259)